2004

State of Utah v. Robert Kelton Berry : Brief of Appellant

Utah Court of Appeals

Kent R. Hart; Salt Lake Legal Defender Association; Attorneys for Appellant.
Mark L. Shurtleff; Attorney General; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ROBERT KELTON BERRY,	:	Case No. 20040142-CA
Defendant/Appellant,	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for aggravated robbery, a first degree felony, in violation of Utah Code Annotated section 76–6-302 (2003), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Stephen L. Roth, presiding. Appellant Robert Kelton Berry remains incarcerated pending the outcome of this appeal. Mr. Berry requests this Court to schedule this appeal for oral argument as provided for under Utah Rule Appellate Procedure 29(a).

KENT R. HART (6242)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, UT 84111
Attorneys for Appellant

MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorney for Appellee

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KENT R. HART (6242)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, UT 84111
Attorneys for Appellant

MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorney for Appellee

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment of conviction for aggravated robbery, a first degree felony, in violation of Utah Code Annotated section 76–6-302 (2003). This Court has jurisdiction over first degree felony appeals which the Supreme Court transfers to this Court. Utah Code Annotated section 78-2a-3(2)(j) (2002).

STATEMENT OF THE ISSUES, STANDARDS OF REVIEW AND PRESERVATION OF THE ARGUMENTS

1. Jury instructions defining reasonable doubt must specifically require the State to obviate all reasonable doubt and must avoid comparisons to major life decisions. The instructions below never explained the State's burden to obviate all reasonable doubt. During closing arguments, defense counsel compared reasonable doubt to deciding whether to marry or buy a house. Did defense counsel's comments or the jury instructions on the State's burden of proof cause structural error as a matter of law?

Because the law is well-established on the requirements for reasonable doubt instructions, the trial judge plainly erred in failing to accurately instruct the jury. State v. Reyes, 2004 UT App 8, ¶19, 84 P.3d 841. In any event, defense counsel's misstatements on reasonable doubt and her failure to object to the instructions fell b elow an objective standard of reasonableness. State v. Templin, 805 P.2d 182, 186 (Utah 1990).

2. The Utah Rules of Criminal Procedure and due process of law require trial judges to instruct the jury on the law at the close of the evidence. The trial judge gave the jury several preliminary instructions on, among other matters, the presumption of innocence, the State's burden of proof, and proof beyond a reasonable doubt, but he did not repeat those instructions at the close of the evidence. Did the trial judge plainly error in failing to instruct the jury at the close of the evidence? Likewise, was defense counsel ineffective for failing to object to the absence of closing instructions? The standards of review for these questions are the same as under Issue #1.[1]

3. Audience members at a jury trial may not signal answers or otherwise coach testifying witnesses. At Mr. Berry's trial, a juror informed the trial judge that he had seen an audience member signaling answers to the victim during the victim's testimony.

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[1]The first two issues are also raised in three appeals presently before the Utah Supreme Court. See State v. Reyes, No. 20030051-SC; State v. Cruz, No. 20020735-SC; State v. Weaver, No. 20030199-SC. The Supreme Court will schedule those three cases for oral argument once the parties complete an expedited briefing schedule in Reyes. The State has filed the opening brief in Reyes and counsel for Mr. Reyes will file a responding brief by September 20, 2004. The briefing in Cruz and Weaver is complete.

Did the trial judge erroneously forbid the jury from considering the coaching in determining the facts and the victim's credibility?

Although trial judges generally have discretion in responding to audience coaching, Sharp v. Commonwealth, 849 S.W.2d 542, 547 (Ky. 1993), this Court reviews jury instructions for correctness. State v. Squire, 888 P.2d 1102, 1104 (Utah Ct. App. 1994). Defense counsel objected to the instruction and requested the trial judge to interview all jurors on whether they had seen the coaching. R. 266: 136-48.[2]

CONSTITUTIONAL PROVISIONS AND COURT RULES

Addendum E:	Utah R. Crim. P. 17(g)
Addendum F:	Utah R. Crim. P. 19
Addendum G:	U.S. Const. Amend. VI
Addendum H:	Utah Const. art. I, §12

STATEMENT OF THE CASE

In April of 2003, the State charged Appellant Robert Berry ("Robert") and his brother Karl Tracey Berry ("Karl") with one count each of aggravated robbery. R. 1-3. Following a preliminary hearing, the trial court bound over both brothers for trial. R. 263: 37-38. On July 29, 2003, Robert requested the trial court to sever his case from Karl's because he claimed that Karl had committed the robbery on his own. R. 25. The

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[2]Volumes 266 and 267 contains the trial transcripts from Mr. Berry's second jury trial. Volume 265 contains the transcript of Mr. Berry's first trial. The preliminary transcript is included in volume 263 while volume 264 contains the transcript of a motion hearing. Finally, the sentencing hearing is included in volume 261. The internal page numbers of these volumes are included after "R." and the volume number.

trial court agreed to sever the cases because of antagonistic defenses. R. 264: 31-33.

Robert proceeded to a jury trial on October 27, 2003. R. 265. That proceeding resulted in a mistrial after a witness testified about inadmissible character evidence. Id. at 130-49. At a subsequent jury trial on December 9, 2003, the trial judge gave the jury preliminary instructions immediately after jury selection, read several other instructions on the law following opening statements, and then read the remainder of the instructions before closing arguments. R. 266: 76, 84; 267: 276. During trial, the judge also removed the victim's mother from the courtroom after a juror reported that the mother had been coaching the victim's testimony. R. 266: 138. The trial judge instructed the jury not to consider as evidence any audience gesturing and allowed defense counsel to cross-examine the victim about the coaching. Id. at 144-46. The jury later convicted Robert of aggravated robbery. Id. at 303, 305-06.

The trial judge sentenced Robert on February 5, 2004, and ordered him to serve a term of six years to life. R. 261: 31; Addendum A. The trial judge also allowed the State up to 60 days to file a motion for restitution. Id. Robert filed a timely notice of appeal on February 17, 2004. R. 231. The State then filed a restitution motion on April 7, 2004. R. 255. That motion remains pending in the trial court.

STATEMENT OF THE FACTS

The relevant facts unfolded on March 12, 2003, at 8:34 p.m. when West Valley City Police Officer Robert Cowan stopped a white Hyundai that was traveling eastbound

on route U-201 (2100 South Freeway) near 5000 West. R. 265: 121-23. Robert was driving the vehicle and his brother Karl was traveling in the passenger seat. R. 267: 233-34. Robert fully cooperated with the officer, including providing his correct name and a rental car agreement for the Hyundai that also listed his name. Id. at 237-38.

During the stop, Officer Cowan noticed that the car's back seat was folded down and had a car bumper lying on top. Id. at 234. Robert explained that the bumper belonged to his car which had recently been stolen. Id. at 238. Officer Cowan also detected a strong gasoline smell from inside the car. Id. at 234. After Officer Cowan cited Robert for a traffic violation, Robert drove away. Id. at 239.

Shortly thereafter, 19-year old Phillip Brandan Booth ("Brandan") was walking southbound on 900 West at approximately 2600 South. Id. at 85-86; 267: 220. Brandan had been at his father's camper/trailer located north of 2100 South. R. 266: 85. Brandan had to walk to 3300 South to catch a bus to travel to his mother's home in Magna because the bus that traverses 900 West had stopped running for the day. Id. at 85-86.

Near a business named Superior Insulation, Robert and Karl pulled along side Brandan. Id. at 87; R. 267: 210, 221. Karl spoke from the passenger seat and offered Brandan a ride. R. 266: 88. Brandan accepted and sat down on the folded back seat next to the spare bumper. Id. at 88-89. Robert informed Brandan of his correct name, but Karl provided a false one. Id. at 92, 119. Although Brandan informed the police that he thought he recognized Robert as an acquaintance from Magna, he realized after getting

inside the car that he did not know either of the brothers. Id. at 88, 117.

As Robert drove toward 3300 South, he indicated that Karl needed to stop briefly at the Valley Fair Mall to return some pants. R. 265: 25; 266: 89-90. Robert drove to the mall and parked near JC Penney's, while Karl went inside the mall. Id. at 91. While waiting for Karl to return, Robert and Brandan briefly conversed in the car. Id. at 120-21; 265: 58-59. During this period Robert blurted out that he was "sick" of being Karl's "chauffeur" and that he felt like Karl's "'F'ing taxi." R. 263: 21; 265: 26; 266: 91. Despite this outburst, Brandan agreed that Robert acted pleasantly toward him. Id. at 107.

After Karl returned to the car, the three men noticed that the bus to Magna had left the mall. Id. at 92-93. Accordingly, Robert and Karl offered to drive Brandan to Magna. Id. Robert then proceeded to a nearby McDonald's restaurant and ordered some food at the drive-up window. Id. at 93, 120. Although Brandan declined to buy any food for himself, Karl bought Brandan an ice cream cone. Id.

From the restaurant, Robert drove northwest toward an industrial area that lies between 3600 West and the Bangerter Highway. Id. The highway runs north and south along approximately 3800 West and intersects with U-201 at about 2100 South. Id.; R. 267: 180-84, 223. Route U-201 leads west to Magna. R. 267: 223. A residential area is located on the east side of 3600 South. R. 267: 180-81.

Brandan mostly remained silent in the back seat while he observed the brothers speaking with each other but he could not hear the content of their conversations. Id.; R.

265: 21. At one point, Brandan did ask where they were traveling and Karl responded that he needed to go to a friend's house. R. 265: 28. Near 2400 South, Karl exclaimed, "Stop, stop, I need to get out." Id. at 93; R. 267: 225. Robert parked the car in the industrial area as Karl exited the car and vomited. R. 266: 93-95. Karl re-entered the car and then Robert resumed driving. Id. at 94.

A few minutes later, Robert suggested that he lift up the back seat so Brandan could sit more comfortably. Id. at 94-96. Accordingly, Robert parked the car behind a warehouse next to a loading dock and Brandan exited the vehicle. Id. at 94-95. As Robert adjusted the back seat, Karl approached Brandan from behind and punched him in the head. Id. at 96-97. Brandan gathered himself and turned around to fight back but stopped when he saw Karl holding a knife and demanding Brandan's possessions. Id. at 97-98. Brandan handed Karl his cd player, wallet, and toiletry bag which contained an electric shaver. Id. at 99. Karl removed $15 from the wallet and returned it to Brandan. Id. Brandan informed the police without specifying anyone that "the suspects took the CD's" and that the CD holder contained "about 130" CDs. R. 267: 226-27.

At some point, Brandan heard Karl yell, "Go get the gun." R. 266: 101. Brandan saw Robert out of the corner of his eye reaching for something under the front car seat. Id. Karl then ordered Brandan to move toward the building, kneel in the corner, and face the wall. Id. at 101-02; 267: 226. Brandan heard one of the brothers threatened to kill him if he turned around but he could not see who made the threat. R. 266: 103, 113.

Brandan then felt cold steel on the back of his head which he "assumed" was a gun. Id. at 103-04, 130. But, Brandan conceded that he never actually saw a gun and that he did not know who had placed the cold steel to the back of his head. Id. at 129-30.

As Brandan stood in the corner, Karl ordered him to remove his sweat shirt, but Robert stopped him and told Karl that they had to go. Id. at 132, 150-52. The two brothers then re-entered the car and drove away. Id. at 150. As they were leaving, one of the brothers threw a dollar to Brandan so he could pay for the bus ride home. Id. at 106. Brandan then walked to a warehouse and approached a security guard who summoned the police. R. 266: 105-06; 267: 168-71. The guard reported that Brandan was bleeding, crying, hyperventilating, and could barley talk. Id. at 169, 190; R. 266: 105-06.

A few days later, Robert spoke by telephone to a police detective to clarify his presence at the crime scene. Id. at 247-48. The detective read Robert the Miranda warnings which Robert willingly waived. Id. at 248, 263. Robert denied participating in Karl's criminal activities and blamed Karl for the robbery. Id. at 252. He informed the officer that the bumper on top of the back seat belonged to his car which Robert believed Karl had stolen. Id. at 266. Apparently, Karl and Robert were together that evening in search of the stolen vehicle. As he and Karl searched, Robert saw Brandan hitch-hiking so he stopped to offer Brandan a ride. Id. Brandan accepted because Robert and Karl were going to Magna as well. Id.

During the encounter, Karl sent Robert a text message through his cellular

telephone in which he told Robert to "pull over just right at the next light" so Karl could "jack" Brandan. Id. at 259-63. Robert understood the term "jack" to mean rob. Id. Robert refused to assist Karl and informed him, "No, Karl, it is not worth it." Id. at 264. This conversation apparently took place after Karl had returned the pants at the mall because Robert wanted to warn Brandan of Karl's plans but he dared not do so with Karl in the car and Brandan sitting in the back seat. Id. at 256-58, 262.

Although Robert admitted stopping the car to allow Karl to vomit and stopping again to adjust the back seat, he stated that he was "totally against" robbing Brandan. Id. at 262. When Karl hit Brandan, Robert ordered Karl to "knock it off and leave him alone." Id. at 265. Robert denied taking Brandan's CDs and explained that Karl had stolen them together with the other items. Id. at 265-66. Robert asserted that he asked Karl to return the stolen items to Brandan, including the wallet and a dollar so Brandan would have money to take the bus home. Id. at 256, 265. And, just as Brandan stated, Robert explained that he stopped Brandan from removing his sweat shirt. Id. at 266.

Robert volunteered to the detective that Karl had a knife but he denied ever using the weapon. Id. at 267. As for the alleged gun, Robert claimed that no gun used at all, but, rather, Karl mentioned a gun and threatened to shoot Brandan to frighten and deter Brandan from calling the police. Id. at 254, 265. Robert adamantly denied putting anything to the back of Brandan's head or threatening to harm him. Id. at 254. Instead, Robert admitted that he told Brandan to remain facing the building because he didn't

want him to be able to identify the car license plate. Id. at 253.

After speaking with Robert, the police charged him and Karl with aggravated robbery. R. 1-3. Upon learning of the charges, Robert voluntarily turned himself over to pretrial services. R. 263: 40. The trial court conducted a preliminary hearing at which Brandan repeated his general claims but, in doing so, alleged that the encounter began "around dusk, about 6:00" contrary to Officer Cowan's undisputed report that he ticketed Robert after 8:30 p.m. Id. at 6. Brandan also testified that he thought he recognized Robert from attending Woods Cross High School as opposed to his statement to police that he knew Robert from Magna. Id. at 18. He indicated further that he may have lost as many as 250 CDs rather than the 130 that he reported to police. Id. at 23. Similarly, Brandan alleged that when Karl first brandished the knife, Karl pointed the knife at Karl's own chest rather than at Brandan's. Id. at 9.

Brandan gave additional conflicting testimony about who stole the CDs. Initially, he testified that he gave Karl "my CD player, my CD's, everything I had on me, my wallet." Id. at 9; Addendum B. When the prosecutor asked Brandan what Robert specifically did during the incident, he stated that he was not sure because he focused on Karl and so he "wasn't concentrating on the driver" Id. When the prosecutor asked Brandan again if he could remember Robert's actions, Brandan replied, "No." Id. The prosecutor pressed Brandan further on who took "any of your specific property? Did the passenger take it all, did the driver participate at all?" Id. Brandan then alleged for the

first time, "The driver took my CD's, and the passenger took the rest." Id.

On cross-examination, Brandan again claimed that "the passenger" had taken the CDs. Id. at 14-15. After Brandan immediately reversed himself and claimed that "the driver" took the CDs, defense counsel asked him if he was "sure." Brandan responded non-responsively, "I am not sure. I am not sure if they were in the car or not." Id. at 15. Then, on redirect examination, Brandan claimed for the first time that the driver took the CDs and stated, "I am keeping these." Id. at 25. The trial court found sufficient evidence that Robert was a party to the crime and bound him over for trial. Id. at 37-38.

At a jury trial, although Brandan maintained that the crime occurred at "dusk," he changed his testimony about the time of the incident from 6:00 p.m. to 8:00 p.m. R. 265: 46. Similarly, instead of claiming to know Robert from Magna or Woods Cross High School, Brandan testified that he thought he recognized Robert from "job corps." Id. at 23. When pressed on cross-examination about his recollection of the events, Brandan conceded that his memory of events was suspect because he was "terrified" following the robbery and he was "really nervous" at the preliminary hearing. Id. at 67, 74. Brandan also contradicted his prior statements and asserted that Karl pointed the knife at Brandan's chest and neck rather than Karl pointing it at his own chest. Id. at 32-36, 62.

Brandan also added several new details and further contradicted his earlier statements about the taking of the CDs. For the first time, he claimed that Robert made a U-turn when the brothers asked Brandan for a ride. R. 265: 22, 70. Brandan claimed

further that the CD case held 200 CDs and that it was "full." Id. at 21. On cross-examination, Brandan denied informing the police that the case contained only 130 CDs. Id. at 52-53. Moreover, Brandan testified, for the first time, that before Robert took the CDs, Karl ordered Robert to "[g]ive him [Brandan] back his CDs," to which Robert replied that he was keeping them. Id. at 38, 68-69. The trial eventually resulted in a mistrial when a police officer repeatedly offered inadmissible testimony. Id. at 146-47.

The trial court conducted a second jury trial a few weeks later. R. 266-67. After selecting the jury but before the attorneys' opening statements, the trial judge gave the jurors preliminary instructions one through ten. R. 175-184; Addendum C. Those instructions informed the jurors of their duties, explained the roles of the various actors in the trial, and outlined the proceedings, the presumption of innocence, and the types of evidence that may be presented. Following the attorneys' opening statements, the trial judge read to the jury instructions 11 to 17 which addressed assessing the credibility of evidence and witnesses, the burden of proof, the presumption of innocence, and definitions of proof beyond a reasonable doubt. R. 184-86; Addendum B.

During Brandan's testimony, he again testified that he gave Karl his "CD's, my radio, my wallet, everything I had." R. 266: 99; Addendum D. Brandan then corrected himself and claimed that Robert had taken the CDs and, again, non-responsively added, "And then I don't remember where my CD's were. I think they were in the car." Id. When asked what Robert was doing while Karl held the knife to his throat, Brandan

testified, "I think he was reaching under the seat. I am not sure. It was a long time ago, and I don't remember every little thing." Id.

When asked about who took the CDs, stated, "I don't remember where they were or anything, but the - his brother [Karl] wanted to give them back to me, and then he [Robert] looked through them." Id. at 100. According to Brandan, Robert responded, "I am keeping these." Id. Brandan asserted that the CD holder contained 200 CDs. Id. On redirect examination, Brandan reiterated that Robert took the CDs. Id. at 148. He also added that Robert appeared "aggressive" during the encounter. Id. at 149, 152.

The police officer who took Brandan's statement at the scene confirmed that Brandan stated that he had lost only 130 CDs and that never specified who took the CDs. R. 267: 226. Likewise, Brandan never disclosed Robert making a U-turn, thumbing through the CDs, or stating that he was keeping the CDs. Id. at 221-22, 227. Brandan also failed to mention Karl ordering Robert to return the CDs to Brandan . Id. at 222.

During Brandan's cross-examination, a juror interrupted the proceedings and indicated that he needed to report something to the court. R. 266: 136. The trial judge took a short break and asked the juror to write his concerns on paper and have the bailiff deliver the note to the judge. Id. The juror reported that, "The lady in the audience is prompting the witness [Brandan] with head shakes the last ten minutes." Id. at 137.

The trial judge cleared the courtroom except for the parties. Id. at 136-37. After questioning Brandan's mother and the victim coordinator, the judge concluded that

Brandan's mother may have signaled answers to Brandan. Id. at 137. Accordingly, the judge removed her from the courtroom for the remainder of the trial. Id.

To remedy the mother's misconduct, defense counsel argued that the trial judge should: (1) ask all the jurors if they had seen any coaching; (2) interview individual jurors; and, (3) instruct the jurors accordingly. Id. at 140. The trial judge agreed to instruct all of the jurors but declined to question jurors to avoid "further emphasiz[ing] the process . . . especially when I believe that the issue can be cured with an instruction." Id. at 141. The judge proposed instructing the jurors to rely only on admitted evidence and to disregard gestures, facial expressions, or other demonstrations by non-witnesses. Id. at 144. He further proposed allowing defense counsel to cross-examine Brandan about whether his mother's coaching had affected his testimony. Id. at 142.

Defense counsel objected to the proposed instruction because she believed that "this juror should be able to consider . . . what he saw as prompting." Id. Counsel complained that the instruction would inform "the juror to disregard what he saw, and he can't give any weight to what [the mother] was saying." Id. at 142. Because of her suspicion that Brandan would simply deny that his mother's coaching had affected his testimony, defense counsel argued that cross-examination would be ineffective. Id.

The trial judge disagreed and ruled that cross-examination would cure any possibility that the coaching had affected Brandan or the jury. Id. at 144. The trial judge instructed the jurors not to consider any gestures or signaling in deciding the evidence:

> We are going to proceed now with cross examination . . . Let me give you an instruction in between here. . . . Jurors are to accept as evidence or rely on in their deliberations only testimony and other evidence presented and accepted in court. They may not consider gestures, facial expressions, or any other demonstration by any other person in the courtroom.

Id. at 145-46.

Following the close of the evidence, the trial judge gave the jurors the remaining instructions, beginning with instruction 18. R. 267: 276. These instructions addressed the jurors' deliberations, reaching a verdict, resolving disagreements, and the elements of the crimes of aggravated robbery and robbery. Id. at 186-205.

During closing arguments, defense counsel argued that the evidence left a reasonable doubt that Robert intentionally participated in Karl's criminal acts. Id. at 282-95. In explaining reasonable doubt, defense counsel likened the seriousness of the jurors' duties to deciding whether to marry or to buy a house:

> And I have talked about how serious these offenses are, and how important, if not more important, than deciding who you are going to marry or if you are going to buy a house. That's how careful you have to be and what factors you would weigh in saying, "Am I going to marry this person?" And the thing is, in a case like that, with buying a house or marrying someone, you can change that decision. You can get a divorce. You can sell your house. But in this case you cannot.

R. 267: 294; Addendum E. In excusing the jury to deliberate, the trial judge gave each of the jurors written copies of the instructions. Id. at 301.

The jury returned a guilty verdict on aggravated robbery. Id. at 303-04. The trial

judge subsequently sentenced Robert to serve a term of six years to life. R. 261: 31. Rather than addressing restitution at sentencing, the trial judge allowed the State up to 60 days to file for restitution because of the "problems" presented in the case concerning the amount owed. Id. This appeal followed. R. 231.

SUMMARY OF THE ARGUMENT

Reversal is required as a matter of law because the jury instructions defining reasonable doubt lessened the State's burden of proof. Specifically, the instructions failed to require the State to obviate all reasonable doubt. The trial court plainly erred and defense counsel was ineffective in approving the instructions. This Court recently ruled in State v. Reyes, 2004 UT App 8, 84 P.3d 841, that failing to require the state to obviate all reasonable doubt constitutes structural error and requires automatic reversal.

Defense counsel compounded this error when she likened reasonable doubt to deciding whether to marry or to buy a home. Utah law specifically forbids comparing reasonable doubt to important life decisions because such decisions, unlike a jury verdict, are revokable and inject considerable doubt into jurors' minds. Defense counsel not only erred in making this comparison but she was ineffective because she added to the jurors' misunderstanding of reasonable doubt.

Even if the reasonable doubt instructions had satisfied due process requirements, the trial judge plainly erred in failing to instruct the jury at the close of the evidence. This Court also ruled in Reyes that the plain language of the Utah Rules of Criminal

Procedure require trial judges to instruct the jury on the applicable law at the close of the evidence. Likewise, due process of law demands that trial judges re-instruct the jury, particularly on the presumption of innocence, the state's burden of proof, and proof beyond a reasonable doubt. Because the failure to re-instruct the jury on these essential rights precluded the jury from understanding the State's constitutional burden of proof, this Court should presume prejudice, just as with the erroneous reasonable doubt instructions. In any event, the State cannot show beyond a reasonable doubt that the trial judge's failure to instruct the jury on the law at the close of the case did not affect the jury's verdict, especially given Brandan's unfounded assumptions that Robert was a willing participant and his poor memory and numerous inconsistencies.

The trial judge further erred in instructing the jury that they could not consider Brandan's mother's coaching in reaching a verdict. The jury has the sole duty to determine the witnesses' credibility. Cross-examination did not remedy the erroneous jury instruction because accepting Brandan's denial is ineffective in curing potential juror bias. The trial judge further erred in refusing to hold a hearing to determine whether the coaching had biased other jurors. When any doubt arises about a juror's partiality, the trial judge has a duty to interview each juror about the jurors' fitness to fairly decide the defendant's guilt or innocence. Because the coaching directly addressed Brandan's credibility and Brandan provided the only evidence of guilt, the failure to interview jurors for bias and the faulty jury instruction prejudiced the defense.

ARGUMENT

Numerous errors of constitutional proportion deprived Robert of a fair determination of his guilt beyond a reasonable doubt. First, the trial judge and defense counsel failed to correctly explain the State's burden of obviating all reasonable doubt. Second, the trial judge plainly erred in failing to instruct the jury at the close of the evidence, especially on the presumption of innocence, the State's burden of proof, and proof beyond a reasonable doubt. Third, in forbidding the jury from considering Brandan's mother's coaching and not interviewing the jurors, the trial judge invaded the jury's sole province to determine credibility and he breached his duty to secure an impartial jury. These errors require reversal and a new trial either because they constitute structural error or the State cannot show harmlessness beyond a reasonable doubt.

I. THE INCORRECT JURY INSTRUCTIONS AND DEFENSE COUNSEL'S ARGUMENTS ON REASONABLE DOUBT REQUIRE REVERSAL AS A MATTER OF LAW

Constitutional principles require this Court to reverse this case as a matter of law because the jury instructions and defense counsel's comments on reasonable doubt lessened the State's burden of proof. In Utah, trial judges must instruct the jury on the State's burden to obviate all reasonable doubt. Utah law also forbids comparing reasonable doubt to important life decisions because such matters often include considerable doubts. The jury instructions here failed to explain the State's burden to obviate reasonable doubt. Defense counsel compounded this error when she likened

reasonable doubt to deciding whether to marry or to buy a home. Reversal is required because structural error resulted and, in any event, the State cannot meet its burden of showing harmlessness beyond a reasonable doubt.

A. The Jury Instructions on Reasonable Doubt Violated Minimal Constitutional Requirements.

The trial judge plainly erred in failing to require the State to obviate all reasonable doubt. In State v. Robertson, 932 P.2d 1219, 1232 (Utah 1997), the Utah Supreme Court adopted Justice Stewart's dissent in State v. Ireland, 773 P.2d 1375, 1381 (Utah 1989), and established three essential requirements for reasonable doubt instructions in Utah:

> First, "the instruction should specifically state that the State's proof must obviate all reasonable doubt." [State v.] Ireland, 773 P.2d [1375,] 1381 [(Utah 1989)] (Stewart, J., dissenting). Second, the instruction should not state that a reasonable doubt is one which "would govern or control a person in the more weighty affairs of life," as such an instruction tends to trivialize the decision of whether to convict. Id. (Stewart, J., dissenting). Third, "it is inappropriate to instruct that a reasonable doubt is not merely a possibility," although it is permissible to instruct that a "fanciful or wholly speculative possibility ought not to defeat proof beyond a reasonable doubt." Id. at 1382 (Stewart, J., dissenting).

Robertson, 932 P.2d 1219, 1232 (Utah 1997), overruled on unrelated grounds in State v. Weeks, 2002 UT 98, ¶25 n.11, 61 P.3d 1000. A violation of any these three requirements unconstitutionally "allows the jury to convict on something less than evidence proving guilt beyond a reasonable doubt." State v. Johnson , 774 P.2d 1141, 1148 (Utah 1989) (Stewart, J., writing for majority).

This Court recently applied Robertson in State v. Reyes, 2004 UT App 8, ¶19, 84 P.3d 841, and declared unconstitutional a reasonable doubt instruction that merely stated that "'[t]he burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt.'" Id. at ¶11 (quoting the jury instruction). This Court rejected the instruction because "it failed to mention that the State's burden of proof 'must obviate all reasonable doubt.'" Id. at ¶19 (quoting Robertson, 932 P.2d at 1232).[3]

The instructions below similarly failed to define the State's burden of proof:

> **14. WHO IS RESPONSIBLE TO CONVINCE THE JURY?**
>
> The prosecution has the burden of proof. It is the one making the accusations in this case. The defendant is not required to prove innocence - you must start by assuming it. According to our law, the defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt. This is an important and humane provision of the law intended to guard against the danger of an innocent person being unjustly punished.
>
> **15. HOW CONVINCED MUST THE JURY BE BEFORE DECIDING THE DEFENDANT IS GUILTY?**
>
> Before you can give up your assumption the defendant is innocent, you must be convinced that the defendant's guilt has been proven beyond a reasonable doubt. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind and convinces the understanding of reasonable persons who are bound to act conscientiously upon it.

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[3]As stated in note 1, the Utah Supreme Court has granted certiorari review in Reyes. In Reyes, although this Court expressed concern that Robertson was not constitutionally sound, it applied Robertson's three-part test and ruled that only the Utah Supreme Court could overrule Robertson. Reyes, 2004 UT 8, ¶¶19-21, 84 P.3d 841.

16. WHAT IS REASONABLE DOUBT?

> A reasonable doubt is one based upon reason and common sense rather than speculation, supposition, emotion or sympathy. It is the kind of doubt that would make a reasonable person hesitate to act. It must be real and not merely imaginary. It is such as would be retained by reasonable men and women after a full and impartial consideration of all the evidence, and must arise from the evidence or lack of evidence in the case.

17. HOW TO EVALUATE DOUBT

> If after such full and impartial consideration some possible doubt exists, you must determine whether such doubt is reasonable in light of all the evidence. Ask yourselves if the doubt is consistent with reason and common sense. The law does not require that the evidence dispel all possible or conceivable doubt, but rather the law requires that the evidence dispel all reasonable doubt. That is what is meant by the phrase "proof beyond a reasonable doubt."

R. 185-86; Addendum C.

None of these instructions affirmatively "state that the State's proof must obviate all reasonable doubt.'" Ireland, 773 P.2d at 1381 (Stewart, J., dissenting)). The closest these instructions come to satisfying this requirement is the statement in Instruction 14 that "[t]he prosecution has the burden of proof." R. 58. Similarly, instruction 9 provides "it is the prosecution's burden to prove to you that the defendant is guilty beyond a reasonable doubt." R. 182. But, as this Court ruled in Reyes, reasonable doubt instructions must not only identify that the State has the burden of proof, they must also "mention that the State's burden of proof 'must obviate all reasonable doubt.'" Reyes, 2004 UT App 8, at ¶19, 84 P.3d 841 (quoting Robertson, 932 P.2d at 1232).

The remaining instructions shed no light on the State's burden. Instruction 17, for example, reads "[t]he law does not require that the evidence dispel all possible or conceivable doubt, but rather the law requires that the evidence dispel all reasonable doubt." R. 186. Instruction 29 states that "the evidence must prove beyond a reasonable doubt the conduct charged in the information and that the defendant committed such conduct with the culpable mental state required for such conduct." R. 192. Then, in defining the elements of aggravated robbery and robbery, the instructions inform the jurors to convict if, "after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt . . . ." R. 200, 202.

None of these instructions affirmatively required the State to obviate all reasonable doubt. Rather, they passively focus on "the evidence" proving guilt rather than burdening the State to obviate all reasonable doubt. The key concept that the jury must understand under Robertson is that the State has the affirmative duty to prove guilt. 932 P.2d at 1232. In failing to convey this essential concept, the instructions " allowed the jury to convict on something less than evidence proving guilt beyond a reasonable doubt." Johnson, 774 P.2d at 1148 (Stewart, J., writing for majority).

Although defense counsel failed to object to the reasonable doubt instructions, this Court reviews jury instructions to ensure that "a manifest injustice" does not result. Utah R. Crim. P. 19(e). A manifest injustice occurs when the trial judge plainly errs.

State v. Geukgeuzian, 2002 UT App 130, ¶5, 54 P.3d 640. A trial court plainly errs when: "(i) an error was made; (ii) the error should have been obvious to the trial court; and, (iii) the error was harmful, so that in the absence of the error, a more favorable outcome was reasonably likely." State v. Helmick, 2000 UT 70, ¶9, 9 P.3d 164.

This Court ruled in Reyes that Robertson plainly requires trial judges to specifically instruct the jury that the State must "obviate" all reasonable doubt. Reyes, 2004 UT App 8, ¶19, 84 P.3d 841. This error was obvious because Robertson "clear[ly] required judges to inform jurors that the State must "obviate" all reasonable doubt. Id.; State v. Garcia, 2001 UT App 19, ¶¶6, 16-18, 18 P.3d 1123. M oreover, under Reyes, prejudice is presumed as a matter of law when faulty instructions prevent the jury from finding guilt beyond a reasonable doubt. 2004 UT App 8, ¶16, 84 P.3d 841. "A constitutional defect in a jury instruction defining reasonable doubt requires automatic reversal of a conviction." State v. Peterson, 673 N.W.2d 482, 487 (Minn. 2004). Reversal is required because an "'instructional error [which] consists of a misdescription of the burden of proof, [] vitiates *all* the jury's findings.'" Id. (quoting Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (emphasis in original)). Thus, this misdescription, by definition, means that "a guilty verdict [] was never in fact rendered. . . ." Sullivan, 508 U.S. at 279. Because the trial judge's omissions amount to structural error, reversal is required as a matter of law. Neder v. United States, 527 U.S. 1, 8 (1999).

B. Defense Counsel Was Ineffective For Failing to Object to the Misleading Reasonable Doubt Instructions and for Compounding the Erroneous Instructions By Comparing Reasonable Doubt to Major Life Decisions.

Independent of the trial judge's errors, defense counsel provided deficient representation because of her own failures to ensure that the jury was correctly informed of reasonable doubt. Defense counsel failed to object to the instructions and even approved of them. She then compounded her failure to object during closing arguments when she erroneously compared reasonable doubt to major life decisions. Because defense counsel's actions misinformed the jury of reasonable doubt, the jury did not enter a valid verdict and structural error resulted.

When criminal defendants claim that counsel was ineffective on direct appeal, they must be represented by new counsel and they "bear[] the burden of assuring the record is adequate" State v. Litherland, 2000 UT 76, ¶16, 12 P.3d 92. Defense counsel is ineffective when counsel acts below an objective standard of reasonableness and the deficient performance prejudices the defendant. State v. Templin, 805 P.2d 182, 186 (Utah 1990). Prejudice requires criminal defendants to show "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. at 187 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

Defense counsel provided deficient assistance because she failed to object to the instructions defining reasonable doubt. Because the instructions failed to define the State's burden to obviate all reasonable doubt, they directly violated Robertson and required automatic reversal. Reyes, 2004 UT App 8, ¶¶19, 21, 84 P.3d 841. "[N]o conceivable strategic reason" supports counsel's failure to object and thereby allowing the jury to convict Robert on less than a reasonable doubt. State v. Beltran-Felix, 922 P.2d 30, 37 (Utah Ct. App. 1996). Even if counsel's conduct was "conscious," her ineffectiveness deprived Robert of his basic constitutional trial rights and are, therefore, properly raised on appeal. State v. Bullock, 791 P.2d 155, 159 (Utah 1989); State v. Belgard, 811 P.2d 211, 214 (Utah Ct. App. 1991).

In addition to failing to object, defense counsel violated Robertson 's prohibition against describing "a reasonable doubt [a]s one which 'would govern or control a person in the more weighty affairs of life. . . .'" 932 P.2d at 1232 (quoting Ireland, 773 P.2d at 1381 (Stewart, J., dissenting)). During closing arguments, defense counsel compared reasonable doubt to "deciding who you are going to marry or if you are going to buy a house." R. 267: 294; Addendum E. Contrary to these analogies, "[n]othing that one does in the course of a normal life span is comparable to the decision to deprive another of either his life or liberty by voting to convict for a crime." Ireland, 773 P.2d at 1381 (Stewart, J., dissenting). Rather, "[p]rofound differences exist between decisions to convict another person and decisions to enter into marriage, buy a home, invest money,

have a child, or have a medical operation–or whatever else might be deemed a weighty affair of life." Id.

Specifically, important life decisions that affect future conduct, inherently involve a degree of risk, hope, and determination, and are usually "revokable" or "at least salvageable." Id. In contrast, a decision to convict looks backward, involves no personal risk, hope or determination, and "is always irrevocable as to jurors." Id. Comparing a reasonable doubt to the doubts encountered when making major life decisions "tend[s] to diminish and trivialize the constitutionally required burden-of-proof standard." Id.

Defense counsel's closing arguments violated these principles. By comparing reasonable doubt to marrying or buying a house, defense counsel endorsed the jurors' entertaining significant doubts in convicting Robert. Counsel's analogies lessened the State's burden of proof "because these decisions involve elements of uncertainty and risk-taking and are wholly unlike the kinds of decisions that jurors must make in criminal trials." Holmes v. State, 972 P.2d 337, 343 (Nev. 1998).

Although defense counsel attempted to use decisions to marry and to buy a car to show "how careful" the jurors must be in deciding whether to convict, her efforts still "tend[ed] to diminish and trivialize the constitutionally required burden-of-proof standard." Ireland, 773 P.2d at 1381 (Stewart, J., dissenting). Counsel did indicate that deciding a person's guilt may be "more important" than major life decisions because unlike those decisions, jurors cannot "change" their decision to convict. R. 267: 294.

Nevertheless, defense counsel failed to explain that important life decisions are "[p]rofound[ly] differen[t]" from juror service. Ireland, 773 P.2d at 1381 (Stewart, J., dissenting). To the contrary, defense counsel communicated to jurors that a reasonable doubt, like major life decisions, involve "uncertainty and risk-taking." Holmes, 972 P.2d at 343. In doing so, defense counsel lessened the State's burden of proof. Ireland, 773 P.2d at 1381 (Stewart, J., dissenting).

Defense counsel's failure to object to the reasonable doubt instructions and her comparisons to major life decisions establish a "'reasonable probability . . . sufficient to undermine confidence in the outcome'" of the trial. Templin, 805 P.2d at 187 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). The failure to adequately explain reasonable doubt to the jury means, by definition, that "a guilty verdict [] was never in fact rendered. . . ." Sullivan, 508 U.S. at 279. Because both the jury instructions and defense counsel comments lessened the State's burden of proof, the jury did not enter a valid verdict. Id.; Reyes, 2004 UT App 8, ¶21, 84 P.3d 841. Thus, defense counsel's failure to object and her misleading arguments prejudiced Robert's rights a fair trial, a jury trial, and the effective assistance of counsel. Sullivan, 508 U.S. at 279.

II. THE TRIAL JUDGE VIOLATED PLAIN UTAH LAW AND MINIMAL DUE PROCESS REQUIREMENTS IN FAILING TO INSTRUCT THE JURY ON THE LAW AT THE CLOSE OF THE EVIDENCE.

Even if the trial judge adequately instructed the jury on reasonable doubt, he violated his duty to instruct the jury on the applicable law at the close of the evidence. Utah law and due process principles require judges to instruct jurors after the completion of the evidence. The trial judge's failure to repeat the instructions, especially on the presumption of innocence, the State's burden of proof, and proof beyond a reasonable doubt, violated minimal due process standards. Like the problems with the reasonable doubt instructions, the trial judge's failure to repeat these instructions and defense counsel's failure to object to them resulted in an invalid verdict and requires reversal as a matter of law. Even if structural error did not occur, Brandan's assumption, contradictions, and memory problems prevent the State from showing harmlessness beyond a reasonable doubt.

A. The Trial Judge Erred in Failing to Instruct the Jury at the Close of the Evidence.

The trial judge violated his duty to instruct the jury on the applicable law when he failed to read all of the instructions at the close of the evidence. In Reyes, this Court ruled that the "plain language of [Utah Rule of Criminal Procedure 17(g)(6)] indicates that a trial court must instruct the jury at the close of the evidence." 2004 UT App 8, ¶24, 84 P.3d 841. That rule mandates that "[w]hen the evidence is concluded and at any

other appropriate time, the court shall instruct the jury." Utah R. Crim. P. 17(g)(6). Although trial judges have discretion to give the jury preliminary instructions and to instruct the jury throughout a trial, this Court ruled that this discretion does not relieve trial judges of the "plain and unambiguous mandate contained in rule 17(g)(6) that the jury be instructed at the close of the evidence." Reyes, 2004 UT App 8, ¶26 & n.6, 84 P.3d 841 (citing other courts that have identically interpreted comparable provisions).

Here, the trial judge gave the jurors several preliminary instructions on the law, addressing such matters as the credibility of evidence and witnesses, the burden of proof, the presumption of innocence, and definitions of proof beyond a reasonable doubt. R. 184-86. He then gave the jury the remaining instructions at the close of the evidence. R 267: 294. In plain violation of Rule 17(g)(6), the trial judge failed to repeat the preliminary instructions, including those addressing the basic legal principles necessary to support a conviction. Reyes, 2004 UT App 8, ¶26, 84 P.3d 841.

B. The Trial Judge's Failure to Repeat the Jury Instructions at the Close of the Evidence Violated Due Process of Law.

Because the plain language of Rule 17(g)(6) required the trial judge to repeat the instructions at the close of the case, the trial judge committed an "obvious" error in failing to re-instruct the jury on the law. Reyes, 2004 UT App 8, ¶¶24-26, 84 P.3d 841; Garcia, 2001 UT App 19, ¶¶6, 16-18, 18 P.3d 1123. As arbiters of the law, trial judges have an affirmative "duty to instruct the jury on the law applicable to the facts of the

case." State v. Squire, 888 P.2d 1102, 1104 (Utah Ct. App. 1994). Thus, under the plain error test, this Court need only decide whether absent the trial judge's omissions a different verdict is "reasonably likely." Helmick, 2000 UT 70, ¶9, 9 P.3d 164. But, Reyes clouds this issue because this Court specifically declined in that case to resolve whether the absence of closing instructions violated due process of law. 2004 UT App 8, ¶¶26, n.7, 84 P.3d 841. Instead, this Court found a violation of Rule 17(g)(6), applied a simple harmlessness standard, and concluded that the failure to re-instruct the jury did not establish a reasonable probability of a different verdict under the facts of that case. Id. at ¶¶27-29.

Nevertheless, due process principles require a more scrutinizing standard of review. Due process requires, at its core, that jurors presume the defendant's innocence and hold the State to its burden of proving guilt beyond a reasonable doubt. State v. Nelson, 587 N.W.2d 439, 445 (S.D. 1998). B y not instructing the jurors on these concepts at the close of the evidence, the trial judge deprived the jury of the opportunity to afford Robert his fundamental due process rights. Id.

Significantly, the Reyes court found no cases that have rejected a due process right to re-instruct jurors at the close of the evidence. In fact, the cases that this Court principally relied on have found due process violations when trial judges fail to repeat jury instructions on the presumption of innocence, the State's burden of proof, and proof beyond a reasonable doubt. Reyes, 2004 UT App 8, ¶¶26 n.6, 84 P.3d 841. Failing to

re-instruct the jury on these rights deprives criminal defendants o f the constitutional right "to a fair trial." Nelson, 587 N.W.2d at 445; see also State v. Woolcock, 518 A.2d 1377, 1386 (Conn. 1986) (requiring closing instructions on the law because fair trial is implicit in the concept of due process); Little v. State, 498 S.E.2d 284, 287 (Ga. Ct. App. 1998) (failure to re-instruct on the presumption of innocence, the State's burden of proof, and the meaning of reasonable doubt is a "violation of the defendant's state and federal constitutional due process rights."); People v. Newman, 385 N.E.2d 598, 599 (N.Y. 1978) ("the fundamental nature of the constitutional precept that each essential element of a crime must be proved beyond a reasonable doubt" requires reinstructing).

The primary jurisdiction (Arizona) that this Court relied on in Reyes is in full agreement. In fact, the reasoning that this Court adopted from Arizona emphasizes that due process principles require repeating jury instructions:

> "Where elementary legal principles that will govern the proceedings are given to the jury as a part of the orientation, the trial judge must repeat all such legal principles in its charge to the jury, where such legal principles include matters of law vital to the rights of a defendant."

Reyes, 2004 UT App 8, ¶25, 84 P.3d 841 (quoting State v. Marquez , 660 P.2d 1243, 1249 (Ariz. Ct. App. 1983)). Arizona now explicitly requires instructions on due-process based principles at the close of the evidence. See, e.g., State v. Romanosky, 859 P.2d 741, 743 (Ariz. 1993); State v. Johnson, 842 P.2d 1287, 1289 (Ariz. 1992).

Due process further demands jury instructions at the close of the evidence because

this practice has become so imbedded in the fabric of the criminal law as to be constitutionally-required. Due process guarantees such time-honored practices when the failure to apply the procedure "'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Patterson v. New York, 432 U.S. 197, 202 (1977) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). American courts have instructed jurors on the law at the close of the evidence since the beginning of our country. Neil P. Cohen, The Timing of Jury Instructions, 67 Tenn. L. Rev. 681, 684, 694 (2000); B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 Ind. L.J. 1229, 1256, 1258 (1993). Utah has followed suit. See Utah R. Crim. Proc. 17(g)(6); Utah Code Ann. § 77-35-17(g)(6) (1982); Utah Code Ann. § 77-31-1 (1953); Utah Comp. L. § 4845 (1888). Accordingly, this "historical tradition [and] contemporary practice" establish a due process right to instruct the jury on the law at the close of the evidence. Parke v. Raley, 506 U.S. 20, 32 (1992); see Medina v. California, 505 U.S. 437, 446 (1992).

Based on these principles, the trial judge below deprived Robert of his due process right to instruct the jury. Providing the jury the written instructions served as no substitute for this due process right because trial judges cannot be assured that the jurors actually read the instructions. Nelson, 587 N.W.2d at 445; Johnson, 842 P.2d at 1289. Likewise, "the brevity of the trial . . . or [] the fact that lawyers have argued the instructions in summation" do not relieve trial judges of their duty to instruct the jury at

the close of the case. Johnson, 842 P.2d at 1289. Here, for example, the trial lasted two full days and the jury heard testimony from five witnesses. None of these alternate measures replace judges' affirmative "duty to instruct the jury on the law applicable to the facts of the case." Squire, 888 P.2d at 1104. The jury can only "discharge its duty as factfinder" when the trial judge "fully and completely give[s] the jury all instructions which are relevant and necessary for the jury to weigh the evidence" and make an informed decision. State v. Owens, 632 N.E.2d 1301, 1305 (Ohio Ct. App. 1993).

C. The Failure to Re-instruct the Jury Constituted Structural Error, and, In Any Event, Was Not Harmless Beyond A Reasonable Doubt.

Having established a constitutional violation, reversal is required because the trial judge's failure to instruct the jury renders a different verdict not only likely but certain under the plain error test. Garcia, 2001 UT App 19, ¶¶6, 16-18, 18 P.3d 1123 . As with the erroneous reasonable doubt instructions, reversal is required as a matter of law because "a guilty verdict [] was never in fact rendered" below. Sullivan, 508 U.S. at 279. The absence of instructions and the jury's consequent failure to understand its constitutional role "'vitiate[d] *all* the jury's findings.'" Peterson, 673 N.W.2d at 487 (quoting Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (emphasis in original)).

Even if no structural error occurred, prejudice should be presumed when trial judges fail to instruct jurors on the due process rights to be presumed innocent, the State's burden of proving guilt, and the meaning of proof beyond a reasonable doubt.

State v. Romanosky, 859 P.2d 741, 744 (Ariz. 1993). Given the "paramount importance" of these rights, Arizona courts have ruled that the failure to read them to the jury at the close of the evidence requires reversal to ensure that defendants were convicted within constitutional constraints. Id. As noted above, this Court relied on Arizona law in determining that judges must instruct jurors at the close of the evidence. Reyes, 2004 UT App 8, ¶25, 84 P.3d 841.

At the very least, reversal is required because the State must show harmlessness beyond a reasonable doubt for violations of nonstructural constitutional errors. State v. Saddler, 2003 UT App 82, ¶27, 67 P.3d 1025. S pecifically, the State has the burden of showing "beyond a reasonable doubt that the failure to reinstruct at the end of the trial did not influence the jury's verdict." Romanosky, 859 P.2d at 743; see also Little, 498 S.E.2d at 288; Owens, 632 N.E.2d at 1306. Even viewing all of the evidence favorably to the jury's verdict reveals numerous conflicts and weaknesses in the State's case. That evidence shows that Robert drove a car that was used to rob a stranger. As Robert drove, Karl communicated to Robert that he wanted to rob Brandan. R. 267: 259-63. Knowing this information, Robert offered to stop the vehicle and adjust Brandan's seat. R. 266: 94-96. Robert then parked the car in a deserted industrial area and adjusted the seat as Karl sneaked up on Brandan, struck him in the head, and robbed him. Id. at 96-99.

Additionally, although Brandan gave numerous conflicting statements, he maintained throughout the proceedings that Robert stole the CDs. Id. at 263: 9, 14-15;

265: 38; 266: 99-100. Brandan claimed further at the second trial that Robert appeared "aggressive" during the encounter. Id. at 149, 152. Then, when Karl stated, "Go get the gun," Brandan saw Robert searching under the car front seat. Id. at 101. Shortly thereafter, Brandan felt cold steel on the back of his head which he "assumed" was a gun. Id. at 103-04, 130. Finally, although Robert stopped Karl from undressing Brandan, Robert told Brandan not to turn around and try to identify the car or the license plate number. Id. at 132, 150-52; 267: 253.

Despite this evidence, the State cannot show beyond a reasonable doubt that Robert was a party to the robbery or had the requisite knowledge and intent. All of the "facts" in support of the jury's verdict are founded on Brandan's assumption that Robert knowingly and intentionally participated in the robbery. In particular, Brandan's initial statements to the USANA security guard and to police that "two men" or "the suspects" had robbed him show that Brandan presupposed that Robert was a co-conspirator, despite the actual facts. R. 267: 170-72, 221, 226. Likewise, although Brandan never saw a gun or anyone holding a gun, he "assumed" that Robert held the gun to the back of his head. R. 266: 103-04, 140. Brandan's belief that Robert was involved was based on nothing more than an "inference upon inference." State v. George, 481 P.2d 667, 667 (Utah 1971). Utah appellate courts have repeatedly rejected such hypothesizing as mere "conjecture" that constitutes reasonable doubt. State v. Brown, 948 P.2d 337, 344 (Utah 1997); State v. Layman, 953 P.2d 782, 791 (Utah Ct. App. 1998).

Brandan's speculative assumptions, in turn, tainted the only allegation that could possibly support that Robert was an active participant in the robbery: the taking of the CDs. Throughout the proceedings, Brandan was hesitant and contradicted himself over Robert's involvement. Brandan only claimed that Robert had taken the CDs after the prosecutor repeatedly prompted him at the preliminary hearing. At that hearing, Brandan asserted that Karl had taken "everything" including the CDs. R. 263: 9. Even after the prosecutor pressed Brandan twice to explain Robert's involvement, Brandan claimed Robert had not taken anything. Id. Brandan accused Robert for the first time of taking the CDs only after the prosecutor later suggested that Robert and Karl had taken different items. Id. at 12. On cross-examination, Brandan contradicted himself again and asserted that the "passenger" had taken the CDs. Id. at 15. When Brandan corrected himself and again accused Robert, defense counsel asked Brandan if he was sure. Id. Brandan expressed doubt and gave a wholly non-responsive answer: "I am not sure. I am not sure if they were in the car or not." Id. Finally, on redirect examination, Brandan claimed for the first time, "The passenger took my CD player and my razor. And I heard the driver say, 'I am keeping these,' and took my CD's." Id. at 25.

Brandan's failure to accuse Robert of taking anything until the prosecutor repeatedly suggested it seriously undermines Brandan's claim that Robert knowingly and actively assisted Karl in the robbery. Those suggestions coupled with Brandan's mere assumption that Robert conspired with Karl cast strong doubt on his actual, independent

recollection. In fact, the evidence shows that Brandan's memory of Robert was, at best, hazy. The robbery admittedly "terrified" Brandan and caused him to hyperventilate and prevented him from speaking. R. 266: 105-06; 267: 169, 190. Brandan also conceded at the preliminary hearing that he concentrated on Karl and the knife rather than Robert. R. 263: 9. Because of his focus on the knife-wielding Karl, Brandan paid little attention to Robert and could not identify any of Robert's acts.

Brandan exhibited further confusion about who took the CDs when he testified at the second trial that he gave Karl his "CD's, my radio, my wallet, everything I had." R. 266: 99; Addendum D. Although Brandan corrected himself and accused Robert, he again explained his confusion through the non-responsive answer, "And then I don't remember where my CD's were. I think they were in the car." Id. Thus, even after speaking with the police and testifying at a preliminary hearing and two jury trials, Brandan still could not clearly identify who took the CDs nor could he give a responsive explanation for his confusion.

Brandan's habit of adding additional details to each subsequent statement further questions the accuracy of his perceptions and memory of Robert actively participating in the crime. Specifically, Brandan did not mention Robert's thumbing through the CDs until the first jury trial. R. 265: 38. At that proceeding, he similarly added to his story that Robert made a U-turn at the initial encounter. Id. at 22, 70. He also changed the time of the incident from 6:00 p.m. to 8:00 p.m. R. 263: 6; 265: 46; 266: 110. The

record establishes that Robert was cited for speeding at 8:34 p.m. R. 265: 121.

Brandan's poor memory again revealed itself when he changed his claims about recognizing Robert from Magna, then to Woods Cross High School, and finally to the job corps. R. 266: 23. He then contradicted his preliminary hearing testimony and claimed that Karl pointed the knife at Brandan's chest and neck rather than first pointing it at Karl's own chest. Id. at 32-36, 62. Further contrary to his statement to police and prior testimony, Brandan changed the number of lost CDs from 130 to 250 down to 200. Id. at 21, 52-53. Similarly, at the second trial, Brandan added for the first time that Robert appeared "aggressive." Id. at 149, 152. Brandan's repeated adding of detail to fit his assumptions about Robert and the State's suggested theory of a conspiracy suggests that he, indeed, focused his attention on Karl, who was obviously in charge and posed the most immediate threat to Brandan's personal safety.

Remembering additional facts appears especially unlikely given Brandan's fear and terror at the time of the robbery. Id. at 67, 74. Scientific research establishes that memory diminishes over time and that recall is particularly low when, as here, the observer focuses his or her attention on another person, and fear is the prevailing emotion. State v. Ramirez, 817 P.2d 774, 780-81 (Utah 1991). Attention is even more diminished when a deadly weapon is used because the weapon distracts the observer. State v. Nelson, 950 P.2d 940, 942 (Utah Ct. App. 1997).

Brandan's improving memory and continued confusion over who took the CDs,

prevent the State from showing that the failure to re-instruct the jury on the law was harmlessness beyond a reasonable doubt. Romanosky, 859 P.2d at 744. In fact, Brandan's claims are inconsistent with the undisputed facts of this case. Karl was the principal actor throughout the incident from the time he offered Brandan a ride, to buying him an ice cream cone, explaining that he needed to visit a friend, robbing Brandan at knifepoint, ordering Robert and Brandan what to do, and commanding Brandan to remove his sweat shirt. And, perhaps, most telling, it is highly unlikely that Karl would order Robert not to take the CDs given Karl's resolve to rob Brandan. Rather, Karl would have encouraged Robert to steal them.

The more reasonable conclusion supports Robert's claims that he repeatedly told Karl to stop the robbery and that he himself did not participate in it. Robert's animosity toward Karl for stealing his car is further consistent with his disharmony rather than collusion. Robert's outburst and resentment about being Karl's "chauffeur" cements the rift in their relationship. R. 263: 21; 265: 26; 266: 91.

Robert's actions before the robbery and his subsequent cooperation with authorities further support his innocence. Robert not only gave Officer Cowan his correct name and a rental agreement, he also offered his name to Brandan, unlike Karl who gave a false name. R. 266: 92, 119; 267: 237-38. To say the least, providing his name would be rather careless if Robert knew of Karl's plan to rob Brandan. Moreover, Robert fully cooperated after the crime; he contacted police, waived his Miranda rights,

and explained that he tried to thwart Karl. R. 267: 247-48, 263. Subsequently, Robert voluntarily turned himself over to the custody of Pretrial Services. R. 263: 40. These actions fully support Robert's claims that Karl presented his plan to rob Brandan after returning the pants at the mall and that Robert had no intent to participate in the crime.

At the very least, the State cannot show harmlessness beyond a reasonable doubt because no other evidence supports Brandan's claims. When a conviction relies on one witness's veracity "and there is not 'other evidence [to support] the defendant's conviction,' [State v.] Rammel, 721 P.2d [498,] 501 [(Utah 1986]," this Court will not find harmlessness beyond a reasonable doubt. State v. Iorg, 801 P.2d 938, 942 (Utah Ct. App. 1990). Because of Brandan's assumptions and the holes in the State's case, the trial judge's failure to instruct the jury was not harmless beyond a reasonable doubt. Rather, the judge's omission prejudices the defense and constituted plain error. Garcia, 2001 UT App 19, ¶16, 18 P.3d 1123 ..

Even if the trial judge had not plainly erred, defense counsel was ineffective for failing to object to the lack of closing instructions. Templin, 805 P.2d at 187. Because Utah law plainly requires instructions at the close of the evidence, defense counsel had valid grounds for objecting. Utah R. Cri. P. 17(g)(6). And, as just shown, the failure to re-instruct the jury on basic constitutional principles prejudiced the defense in this factually uncertain case. Accordingly, defense counsel deprived Robert of his right to effective assistance and a new trial is required. Templin, 805 P.2d at 187.

III. THE TRIAL JUDGE ERRONEOUSLY LIMITED THE JURORS' DUTY TO DETERMINE WITNESS CREDIBILITY AND FAILED TO ADEQUATELY ENSURE THAT THE JURORS WERE IMPARTIAL

The trial judge further deprived Robert of a fair trial when he misinformed the jurors not to consider Brandan's mother's coaching for any purpose, including determining Brandan's credibility. Determining witness credibility, including the existence of possible coaching, is within the jury's sole province. The judge's refusal to interview the jurors or hold an evidentiary hearing deprived Robert of his right to a fair trial. Because the State's case depended entirely on Brandan's veracity, the trial judge's mishandling of the coaching issue was not harmless beyond a reasonable doubt.

Utah law does not specifically address the trial court's duties when an audience member coaches a witness. But, at they very, Utah statutory law, and the state and federal constitutions guarantee accused persons the right to a speedy public trial by an "impartial jury." U.S. Const. Amend. VI; Utah Const. art. I, §12; State v. Woolley, 810 P.2d 440, 443 (Utah Ct. App. 1991); Utah Code Ann. § 77-1-6(1)(f) (1999). Because juror bias arises most commonly in jury voir dire, the case law in Utah focuses on trial judges' duties in selecting impartial jurors. But, the duty to ensure an impartial trial does not dissipate after the jury is chosen. Trial judges have "a duty to detect and investigate the potential for partiality . . . ." State v. King, 2004 UT App 210, ¶25, ___ P.3d ___.[4]

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[4]Appellate counsel has used a similar analogy in State v. Cruz, No. 20020735-SC, in which the appellant challenges juror bias that was discovered after jury selection.

The jurisdictions that have specifically addressed coaching have concluded that because "coaching is a matter which bears upon a witness' credibility[,] the question of coaching is one for the jury." State v. Rodriguez, 509 N.W.2d 1, 3 (Neb. 1993) (see list of cases cited therein). "When the trial court's attention is drawn to the fact that a witness is being coached by a spectator at the trial, the trial court has a duty to take curative action." Id. at 3-4. The need for action derives not from the wrongfulness of the coaching but, rather, the biasing effect on the juror's ability to assess the coached witness's credibility. Sharp v. Commonwealth, 849 S.W.2d 542, 547 (Ky. 1993).

Trial courts have discretion in deciding how to respond to audience members' coaching of witnesses. Sharp, 849 S.W.2d at 547; State v. Boone, 820 P.2d 930, 932 (Utah Ct. App. 1991) (discussing disruptive audience member). But, the failure to take curative action in close evidentiary cases can be so "egregious and inimical to the concept of a fair trial that [it] cannot be disregarded in the name of trial court discretion." Sharp, 849 S.W.2d at 547. Judges have dealt with coaching by instructing the jury, allowing cross-examination on coaching, interviewing the person coaching, individual jurors, or all jurors collectively, obtaining affidavits from jurors, and conducting evidentiary hearings. See United States v. Rutherford, 371 F.3d 634, (9th Cir. 2004) (affidavits from jurors who were intimated by IRS agents in courtroom); United States v. Tolliver, 61 F.3d 1189, 1208 (5th Cir. 1995) (cautionary instruction); Sharp, 849 S.W.2d at 547 (interviewed coach); Rodriguez, 509 N.W.2d at 3 (evidentiary hearing).

In this case, the trial judge instructed the jury not to consider any audience reactions in determining credibility and then allowed defense counsel to cross-examine Brandan about the coaching. The trial judge abused its discretion in both instances. Although the trial judge had discretion to respond to the coaching, he also had a legal duty to correctly "instruct the jury on the law applicable to the facts of the case." Squire, 888 P.2d at 1104. Accordingly, this Court reviews jury instructions for correctness. Id.

The instruction here erroneously restricted jurors' exclusive role to determine witness credibility. Rodriquez, 509 N.W.2d at 7. "[T]he jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence." State v. Yanez, 2002 UT App 50, ¶19, 42 P.3d 1248 (quoting State v. Workman, 852 P.2d 981, 984 (Utah 1993)). Contrary to this role, the trial judge's instruction barred jurors from considering the coaching for any purpose: "Jurors are to accept as evidence or rely on in their deliberations only testimony and other evidence presented and accepted in court. They may not consider gestures, facial expressions, or any other demonstration by any other person in the courtroom." Id. at 145-46.

This instruction not only forbade the jurors from considering unsworn testimony, but also prohibited them from weighing Brandan's mother's coaching for any other purpose, including assessing Brandan's credibility. R. 266: 144. As the prosecutor conceded below, coaching "goes to the credibility of the witness and the weight of the evidence." Id. at 141. When, as here, the trial judge's comments affect the credibility of

a witness, "the judge invades the province of the jury." Rodriquez, 509 N.W.2d at 5.

The remaining instructions similarly failed to sufficiently "'advise[] the jury on the law.'" State v. Penn, 2004 UT App 212, ¶28 94 P.3d 308 (quoting Laws v. Blanding, 893 P.2d 1083, 1086 (Utah Ct. App. 1995)). The trial judge did instruct the jury on deciding whether to believe a witness based on such matters as truthfulness, demeanor, and consistency. R. 185. However, numerous other instructions repeatedly limited the jury's deliberations "solely [to] the evidence presented at the trial." R. 182-84. Also, the trial judge specifically instructed the jurors on the coaching "to accept as evidence or rely on in their deliberations only testimony and other evidence presented and accepted in court." R. 145. These instructions, when taken as a whole, erroneously informed the jurors that the mother's coaching was not evidence upon which the jury could rely for any purpose, including assessing Brandan's credibility. Rodriquez, 509 N.W.2d at 5.

This Court's decision in State v. Boone, 820 P.2d 930 (Utah Ct. App. 1991), illustrates the inadequacy of the instructions below. In that case, an audience member commented on the merits of the prosecution and gestured during defense counsel's closing arguments. Id. at 934-35. This Court ruled that the trial judge adequately addressed possible prejudice to the jury when he "instructed the jury to limit their deliberations to the evidence presented during trial" and he explained the jury's duty to weigh the evidence and the credibility of the witnesses. Id. at 935. This Court premised the lack of prejudice on the judge's "specific factual findings" that none of the jurors had

seen or heard the disruptive behavior. Id.

In contrast, at least one juror below, and possibly others, saw Brandan's mother's coaching. Also, unlike Boone, the trial judge could not rule out prejudice to the jury because he did not witness the mother's coaching or the jurors' reaction to it. R. 266: 136. Adding to these problems, the trial judge erroneously limited the jury's assessment of Brandan's credibility. Further, credibility was not at issue in Boone because the disruption was limited to defense counsel's closing arguments. Here, the coaching occurred during the key witness's testimony. Thus, unlike in Boone, this Court cannot be assured that the coaching did not prejudice the jury and that the instructions adequately conveyed that the coaching was relevant in determining Brandan's credibility.

Rodriquez provides a comparable example impairing the jury's ability to decide witness credibility in a coaching incident. There, defense counsel objected because a police officer who was seated at the prosecution table was signaling answers to a cooperating co-conspirator who testified at a drug trial. Rodriquez, 509 N.W.2d at 3. In front of the jury, the trial judge responded to the objection, "No, he wasn't. I was watching him." Id. The trial judge later allowed defense counsel and the prosecutor to present to the jury witnesses to the coaching and allowed cross-examination on the coaching. Id. at 3-4. The Nebraska Supreme Court ruled that the trial judge's ruling that no coaching had occurred improperly bolstered the witness's credibility which was "an issue for the jury to decide." Id. at 4. The comments were particularly harmful because

the co-conspirator was the sole witness to the alleged crime and, therefore, "the prosecution could succeed only if the jury believed the testimony of" the witness. Id.

This case is nearly identical. Although the trial judge below did not comment on Brandan's credibility, his forbidding the jurors from considering the mother's coaching eliminated the coaching from the jury's deliberations. Thus, like the judge's comments in Rodriguez, the trial judge here restricted the jury's credibility assessment of the only witness to the alleged crimes.

Moreover, the trial judge's decision to allow defense counsel to cross-examine Brandan failed to remedy the erroneous jury instruction. "Ordinarily, permitting [coaching] to be raised on cross-examination will constitute an effective cure." Rodriquez, 509 N.W.2d at 4. But, cross-examination is ineffective when the trial court limits the jury's credibility assessment of the State's sole witness to a crime. Rodriquez held that the judge's comment that no coaching had occurred "blunted the defense's weapon of cross-examination." Id. at 5.

Like the judge's comments in Rodriguez, the instruction limiting the jury's credibility assessment of Brandan inoculated defense counsel's efforts to impeach Brandan's credibility. Likewise, counsel's cross-examination was ineffective because, just as defense counsel predicted, Brandan denied that he saw his mother's coaching or was affected by it. R. 266: 142, 146. Brandan's denials coupled with the instruction forbidding the jury from weighing the coaching nullified the cross-examination.

The trial judge further abused his discretion in failing to grant defense counsel's request to interview all the jurors for possible bias. R. 266: 138. Again borrowing from Utah law on jury voir dire, Utah appellate courts have repeatedly ruled that, " [o]nce a juror's impartiality has been placed in doubt, a trial judge must investigate by further questions to determine if the juror has merely 'light impressions' or impressions that are 'strong and deep' and which will affect the juror's impartiality." State v. King, 2004 UT App 210, ¶14, ___ P.3d ___ (internal quotations omitted). Because the duty to inquire attaches whenever even "possible bias" arises, it must be "liberally exercise[d]." Saunders, 1999 UT 59, ¶43, 992 P.2d 951. But, the only way to determine if any other jurors had seen the coaching and were biased by it was to question the jurors themselves. Despite an "indication" that Brandan's mother's coaching could have affected jurors' partiality, the trial judge refused to interview jurors. King, 2004 UT App 210, ¶15.

The policies supporting the law on improper contacts between jurors and interested parties support the need for an evidentiary hearing. In State v. Pike, 712 P.2d 277, 281 (Utah 1985), the Utah Supreme Court created a rebuttable presumption of prejudice when jurors have "more than the most incidental contact" with interested parties. This Court has summarized the two main reasons supporting the presumption as: (1) "it is difficult, if not impossible, to prove how an improper contact may have influenced a juror;" and, (2) "[i]f improper juror contact is not prevented, a doubt may exist in the mind of the losing party, and the public as a whole, as to whether the

defendant was given a fair trial." State v. Swain, 835 P.2d 1009, 1011 (Utah Ct. App. 1992). But, the overriding concern in Pike was preventing "breeding a sense of familiarity that can clearly affect one's judgment as to credibility. . . ." 712 P.2d at 281.

For these reasons, this Court has ruled that although trial courts are not required to conduct a hearing, "in most instances [a hearing] would be helpful to the court" in determining possible bias. Logan City v. Carlsen, 799 P.2d 224, 227 (Utah Ct. App. 1990). In fact, almost all of the cases that have reviewed improper juror contacts have held some sort of evidentiary hearing. Id. (listing cases); see, e.g., State v. Shipp, 2004 UT 40, ¶4, 86 P.3d 763; State v. Thomas, 777 P.2d 445, 451 (Utah 1989) (requiring a hearing when jurors fail to disclose possible bias during jury voir dire).

The Pike line of cases directly translates to this case. Just like improper juror contacts, it is impossible to determine how coaching influences a juror without interviewing the jury. Without a hearing, courts are left to "conjecture as to possible bias. . . ." Carlsen, 799 P.2d at 226. Coaching also "creates an appearance of collusion or impropriety" that casts doubt on the fairness of the trial, both to the public and the defendant. Swain, 835 P.2d at 1011. The only way to resolve these concerns is for the trial court to conduct a hearing and have the jurors testify about the coaching.

Even more importantly, just as with improper juror contacts, the overriding concern here is the jurors' ability to fairly assess Brandan's "credibility." Pike, 712 P.2d at 281. This concern for determining credibility led Utah courts to presume prejudice.

Id. This same concern applies to this case in which the trial judge instructed the jury not to consider the coaching in determining Brandan's credibility.

The trial judge's handling of the coaching requires reversal because the State cannot show that the erroneous instruction or the failure to hold a hearing was harmless beyond a reasonable doubt. When, as here, the trial court limits the jury's credibility assessment of a coached witness whose testimony provides the only evidence of a crime, the violation is so "egregious and inimical to the concept of a fair trial that [it] cannot be disregarded in the name of trial court discretion." Sharp, 849 S.W.2d at 547. This Court recently expressed identical sentiments in a case of potential juror bias and found prejudice when "a witness's testimony played a small but critical and controverted role" in the prosecution. Shipp, 2004 UT App 40, ¶18, 86 P.3d 763. Brandan's role was not only "critical and controverted" but was the only evidence supporting Robert's guilt. Brandan's credibility was so vital to the State's case that the trial judge's errors prevent a showing of harmlessness even under a simple reasonably-likely standard of review.

Sharp soundly supports this conclusion. In that case, a family friend who sat in the audience at trial coached the alleged child rape victim. 849 S.W.2d at 546-47. The Kentucky Supreme Court ruled that because the child's testimony was "crucial" to establishing the government's case, "[her] demeanor during testimony and her ability to withstand cross-examination inevitably influenced the jury as to whether or to what extent she should be believed." Id. at 547. That court reversed the convictions because it

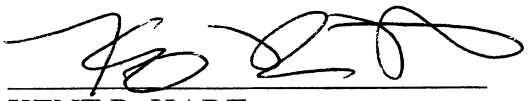
was "impossible to say that the witness did not derive confidence and assurance from" the family friend's "encouragement, approval and comfort at the time her credibility was being assessed by the jury." Id.

Like the child witness in Sharp, Brandan's credibility, perceptions, and memory provided the only evidence supporting guilt. Moreover, Brandan admitted throughout the proceedings that he was nervous, had not paid attention to Robert during the robbery, and that his memory of the incident was poor. Thus, any encouragement or help that he received from his mother was "crucial" to assessing his believability. Id. A different verdict was more than likely because the trial judge "misle[d] the jury to the prejudice of the complaining party [and] insufficiently or erroneously advise[] the jury on the law." Penn, 2004 UT App 212, ¶28, 94 P.3d 308 (quoting Laws , 893 P.2d at 1086) (internal citations omitted).

CONCLUSION

Appellant Robert Berry requests this Court to reverse his convictions and remand this matter for a new trial because the erroneous jury instructions, trial judge's failure to instruct the jury on the law, the faulty instruction on coaching prejudiced his defense.

Dated this 30th day of August, 2003.



KENT R. HART
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, KENT R. HART, certify that I have caused to be delivered eight copies of this brief to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 30th day of August, 2004.

KENT R. HART

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of August, 2003.

_____

ADDENDA

Addendum A:	Judgment and Sentence, February 5, 2004
Addendum B:	Preliminary Hearing Transcript, June 10, 2003
Addendum C:	Jury Instructions
Addendum D:	Excerpts, Trial Transcript, December 9, 2003
Addendum E:	Excerpts, Trial Transcript, December 10, 2003
Addendum F:	Utah R. Crim. P. 17(g)
Addendum G:	Utah R. Crim. P. 19
Addendum H:	U.S. Const. Amend. VI
Addendum I:	Utah Const. art. I, §12

Addendum A

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, WEST VALLEY DEPT.

THE STATE OF UTAH

Plaintiff,

vs. Robert M Berry
dob 4-31-75

Defendant.

JUDGMENT, SENTENCE (COMMITMENT)

Case No. 031100183
Count No. #1
Honorable Stephen Roth
Clerk DS
Reporter
Bailiff
Date 2-5-04

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☑ a jury; ☐ the court, ☐ plea of guilty; ☐ plea of no contest; of the offense of Agg Robbery, a felony of the 1st degree, ☐ a class ____ misdemeanor, being now present in court and ready for sentence and represented by K Peters, and the State being represented by S Curtis-Regius, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a indeterminate term not to exceed one year. ☐ at defendant's election.
- ☒ to a maximum mandatory term of 6 years years and which may be life;
- ☐ not to exceed five years;
- ☐ of not less than one year nor more than fifteen years;
- ☐ of not less than five years and which may be for life;
- ☐ not to exceed _____ years;
- ☐ and ordered to pay a fine in the amount of $_____;
- ☒ and ordered to pay restitution in the amount of $_____ to State has 60 days to file

- ☐ such sentence is to run concurrently with _____
- ☐ such sentence is to run consecutively with _____
- ☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Court(s) _____ are hereby dismissed.
- ☐
- ☐ Defendant is granted a stay of above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.
- ☑ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this judgment and commitment.
- ☑ Commitment shall issue forthwith

DATED this 5 day of February 20 04

DISTRICT COURT JUDGE

APPROVED AS TO FORM:

Defense Counsel

Deputy County Attorney

(White-Court) (Yellow-Jail/Prison/AP&P) (Pink-Defense)

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Addendum B

20040142-CA

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROBERT KELTON BERRY, Defendant.	Case No. 031100783 Transcript of: PRELIMINARY HEARING
STATE OF UTAH, Plaintiff, vs. KARL TRACY BERRY, Defendant.	Case No. 031100784 Transcript of: PRELIMINARY HEARING

BEFORE THE HONORABLE TERRY L. CHRISTIANSEN

3636 Constitution Blvd.
West Valley City, Utah 84119

JUNE 10, 2003

REPORTED BY: BRAD YOUNG
238-7531

APPEARANCES

For the Plaintiff:

ROBERT G. NEILL
BLAKE HILLS
Assistant Attorneys General
2001 South State, #S-3700
Salt Lake City, Utah 84190

For the Defendant
Robert Kelton Berry:

SUSANNE GUSTIN
Attorney at Law
10 West Broadway, #210
Salt Lake City, Utah 84101

For the Defendant
Karl Tracy Berry:

PAUL C. QUINLAN
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

INDEX

PROCEEDINGS

THE COURT: For the record, this is the matter of State of Utah vs. Robert Kelton Berry. And appearances for the record, please.

MR. NEILL: Rob Neill for the State.

MR. QUINLAN: Paul Quinlan for Mr. Karl Berry.

MS. GUSTIN: Susanne Gustin for Robert Berry.

THE COURT: All right. I did receive an Amended Information that was just sworn to me by Officer Johnson. Ms. Gustin and Mr. Quinlan, have you both received copies of those Informations?

MS. GUSTIN: Yes, your Honor.

THE COURT: Any objection to the Amended Information?

MS. GUSTIN: No.

THE COURT: Mr. Quinlan?

MR. QUINLAN: No.

THE COURT: For the record, the case against Karl Berry is case 031100784. The case against Robert Kelton Berry is No. 031100783. Are both sides ready to proceed this morning?

MR. NEILL: Yes, your Honor.

MS. GUSTIN: Yes, your Honor.

MR. QUINLAN: Yes.

THE COURT: Any preliminary matters before we take

testimony?

MR. NEILL: I don't believe so, your Honor.

MR. QUINLAN: Just ask the exclusionary rule be invoked. I don't know who all is in here.

MR. NEILL: We are intending on calling two witnesses: One is our victim, who we would request be permitted to stay, if he wishes; and our case manager, Detective Frank Johnson.

THE COURT: Under the rules I believe they are both entitled to stay.

Call your first witness.

MR. NEILL: The State's first witness will be Phillip Brandan Booth.

* * *

PHILLIP BRANDAN BOOTH,

called as a witness by the State, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. NEILL:

Q Could you please state your name and spell it for the record?

A Yes. It is Phillip Brandan Booth, P-h-i-l-l-i-p B-r-a-n-d-a-n B-o-o-t-h.

Q Do you go by Brandan?

A Yes, I do.

Q Brandan, I would like to draw your attention to March 12 of 2003, this past March. Were you on that day in the area of 900 West and 2600 South?

A Yes, I was.

Q And could you tell the Court what you were doing on that day in that area?

A I was trying to walk to a bus stop, because the bus had quit running.

Q Were you alone?

A Yes, I was.

Q Approximately what time of day was this?

A It was around dusk, about 6:00.

Q And did you have any belongings with you?

A Yes, I did.

Q What belongings did you have with you?

A I had my CD's, my CD player, and my razor.

Q While you were walking in that area, did anything unusual happen?

A Yes. Some kids came and asked me if I would like a ride.

Q Tell us how -- were they walking? They were obviously in a vehicle?

A Yes, they were.

Q What type of a vehicle was it, do you recall?

A A Hyundai Sonata or Escalade. It was a midsize Hyundai.

Q What color was it?

A It was white.

Q Did you recognize any of these two individuals?

A I thought I did at first. But once I got in, I didn't.

Q Did you have any conversation with them at that point?

A Yeah.

Q Could you tell us about that?

A He said, "We got to stop at the mall, and we will take you all the way out to Magna if you would like." And I said, "All right." They seemed friendly.

Q Where were they seated in the vehicle?

A In the front seats.

Q So what happened at that point?

A I don't understand. What do you mean?

Q They mentioned that they had to go to the mall?

A Oh, yes. They went to the mall, and the passenger went and returned something and got some money. Do you want me to continue?

Q Yes.

A All right. Then we went over to McDonald's, and they bought some hamburgers for themselves. That's after they said,

"Oh, no, that is no problem. We are going out there, anyways, to Magna." Then they turned off, on a road, and I kind of got fishy, and I didn't know what was going on. And they drove around right by USANA, and they got out, and they said, "Let me fix the seat for you." And then the passenger came over and hit me in my face, pulled a knife out on me.

Q What did he do -- well, I will stop you real quick. They said that they wanted to fix your seat. What was wrong with your seat?

A Well, there was like a bumper in the back from, I guess, from the driver's car. And the seats were folded down. You now how they fold down into the trunk so it would stick up. And that's why.

Q So where was this area that they pulled into, that you thought was a little fishy?

A It was in the industrial district, just closed-down buildings and stuff like that, or closed -- not closed for business, but closed for the day.

Q Was that still within the boundaries of Salt Lake County?

A Yes, it was.

Q So you mentioned that the passenger got out and hit you?

A Yes, he did.

Q Did he say anything to you before he did that?

A No. He just caught me. He caught me blind-sided.

Q Then after he hit you did he say anything at that point?

A He just pulled out a knife. He said, "What do you got? What do you got?"

Q What did he do with the knife?

A Held it like this. Not to me, but to his chest like this, like he was going to cut me with it.

Q And then what happened?

A After I gave him most of my stuff he said, "Go get the gun. Get the gun."

Q Who was he --

A He was talking to the driver.

Q And you gave him your stuff. What did you give him?

A I gave him my CD player, my CD's, everything I had on me, my wallet.

Q When he had the knife out did you feel threatened by that?

A Yes, I did.

Q And he told the other, "Go get the gun." And then what happened?

A Then they made me stand in the corner.

Q In the corner of where?

A There was a truck, like a bay for a truck, and there was a corner, and it was like a loading dock, and it was like a

door, and then they made me stand in the corner over by the truck.

Q And then once they had you stand over in that corner, what happened?

A I felt the gun on the back of my neck, and they got in, they said, "You move, you're dead," and took off.

Q So who had the gun?

A I don't know.

Q And you said you felt the gun. How did it feel?

A Like cold steel, like a gun. I don't know how else, how I could explain it.

Q And where was -- where did you feel that against your --

A The back of my head to my neck.

Q Did they say anything when that gun was put on you?

A Yeah. They said, "If you move, you're dead."

Q Do you remember who had the gun, whether it was the driver or the passenger?

A I don't know. I didn't see the gun.

Q So where were you facing when that was going on?

A I was facing the corner of the building.

Q What happened at that point?

A Then they got in the car and drove off. I ran and got the security guard at USANA.

Q And they took your belongings --

A Yes, they did.

Q -- with them? Now, Brandan, would you recognize either of these individuals if you saw them again?

A Yes. I picked them out of a lineup.

Q And would you recognize them if you saw them again face to face?

A Yes.

Q Do you recognize anyone in this courtroom who was involved?

A Yes, I do.

Q Could you please tell the Court and point out what they are wearing?

A This one was the driver. He is wearing a tie and a green and blue plaid shirt. And the other one was the passenger. He is in blue jail clothes.

MR. NEILL: Your Honor, may the record reflect the identification of the defendants?

THE COURT: Let's get the names for the record. Which defendant is wearing the plaid shirt?

MS. GUSTIN: That's Robert Berry.

THE COURT: All right. And then I am assuming Karl Berry is the gentleman in the blue jail clothes. Is that correct, Mr. Quinlan?

MR. QUINLAN: Yes.

THE COURT: Any objection to identification by the

witness?

MS. GUSTIN: No.

MR. QUINLAN: No.

THE COURT: The record will reflect identification of both Mr. Robert Berry and Mr. Karl Berry by the witness.

MR. NEILL: Thank you, your Honor.

Q And just a couple more questions, Brandan. When Karl -- when the passenger had the knife and said, "Give us your stuff," do you recall what the driver was doing at that point?

A I wasn't concentrating on the driver.

Q Did you see the driver do anything else when they stopped and pulled the knife and asked for your stuff?

A No.

Q Brandan, do you recall whether anyone took specific -- any of your specific property? Did the passenger take it all, did the driver participate at all?

A The driver took my CD's, and the passenger took the rest.

MR. NEILL: Thanks.

THE COURT: Cross examination?

* * *

CROSS EXAMINATION

BY MS. GUSTIN:

Q Mr. Booth, weren't you hitchhiking that day?

A No, I wasn't.

Q You weren't? So you were just walking along, to go to the bus stop?

A To go to the bus stop.

Q Why did you get in the car with these guys?

A I don't know. I -- stupid, I guess.

Q At some point did you get sick and you were vomiting outside the car or something?

A No.

Q Did you get out of the car for any reason, at any point?

A Yes, when they were going to push the seats up.

Q So that's when the passenger came over and hit you in the face?

A Yes, it is.

Q Was it Karl Berry who said, "What you got? What do you have?"

A What one is Karl Berry?

Q This one, the passenger.

A Yes, it is.

Q What was the driver saying, anything?

A He wasn't saying anything.

Q When the passenger said, "Go get the gun," to the driver, did the driver do anything?

A I seen him reach under the seat. But then they made

me get in the corner.

Q Who said, "If you move, you're dead"?

A The passenger, Karl.

Q So did the driver ever say anything to you?

A He didn't say anything to me, no.

Q So he never said anything to you?

A No.

Q Did the driver say anything to the passenger?

A Yes.

Q What did he say to the passenger?

A Before, they were talking, buddy-buddy talk in the car.

Q Were you ever asked to take any of your clothes off?

A Yes, I was.

Q What did you take off?

A I started to remove my sweater, but that is as far as it got.

Q The passenger told you to do that?

A Yes.

Q The driver told him to knock it off and told him --

A I didn't hear that.

Q What about your pants? Were you ordered to take your pants off?

A No, I wasn't.

Q Where were the CD's? They weren't on your person,

were they?

A Yes, they were.

Q They weren't in the car?

A No. I was holding them.

Q You were holding them, and the driver took them from you?

A No, the passenger took them.

Q The passenger did? OK. So then the driver didn't take anything from you?

A He took the CD's.

Q You just said the passenger took the CD's. Are you not sure?

A I am not sure. I am not sure if they were in the car or not.

Q What was in your wallet?

A Fifteen dollars and my ID's and cards.

Q Were your ID's taken?

A No, they weren't.

Q The $15 was taken?

A Yes, it was. But they threw a dollar back at me for the bus ride.

Q Did they say anything to you when they threw the dollar back at you?

A Yeah. They said, "Here is for the bus."

Q And who said that to you?

A I don't remember.

Q And it was the passenger who took the wallet; isn't that correct?

A Yes.

Q And the passenger who took the $15?

A Yes.

Q Did you ever hear the driver saying to the passenger to leave him alone, or that's enough, or anything like that?

A I don't recall.

MS. GUSTIN: That's all I have.

THE COURT: Thank you, Ms. Gustin.

Mr. Quinlan?

* * *

CROSS EXAMINATION

BY MR. QUINLAN:

Q Where were you on your way to that night?

A I was going out to my mom's.

Q To your mom's?

A Yes.

Q Your mom lives in Magna?

A Yes.

Q Where were you coming from?

A From a -- I prefer not to answer these questions.

MR. NEILL: We would object to the relevancy of where he was coming from.

THE COURT: I think it is permissible. I will instruct you to answer the question, unless there is some sort of an incrimination aspect, which I cannot imagine there would be.

MR. NEILL: Can we approach, your Honor?

THE COURT: Please.

(Off-the-record discussion at the bench.)

THE COURT: All right. Mr. Booth, what I am going to do is instruct you not to give a specific address if it relates to a family member. But you can give a general location, or if you were at your father's house, your brother's house, your sister's house, or relative's house, just indicate that. But you do not need to give the specific address.

THE WITNESS: I was in my father's trailer.

THE COURT: So you had come from your father's trailer, then?

THE WITNESS: Yes.

Q Was it just you and your father together at that trailer?

A It was just me and one of his employees.

Q Your father was not home?

A No, he wasn't. He lives in a house.

Q Were you with anybody else earlier that day?

A No, I wasn't.

Q How long had you been at the trailer?

A About five hours, cleaning it out. I was cleaning it out.

Q With the help of one of your father's employees?

A Yes.

Q You said that you thought that you recognized one of the individuals in the Hyundai?

A Uh-huh (affirmative).

Q Would that have been the driver or the passenger?

A The driver.

Q How was it that you thought you knew him?

A I thought I went to school with him.

Q Was that here in Salt Lake, West Valley?

A Yes, it was.

Q Where was that? Where did you go to school?

A I went to Woods Cross.

Q Woods Cross, that's not in Salt Lake?

A Salt Lake -- I guess it is Davis County. It is not Salt Lake County.

Q You thought you recognized the driver from going to high school with him?

A Yes.

Q So when the Hyundai pulled up to you, you were on the driver's side of the vehicle?

A I was on the passenger's side.

Q And you didn't recognize the passenger?

A No.

Q Who was it that spoke to you first?

A The passenger.

Q And do you recall specifically what he said?

A "Where are you going?" is what he said first.

Q But you weren't hitchhiking?

A No.

Q You were just walking along?

A OK, they pulled up to the side of me, and they said, "Would you like a ride?" Then I got in. And he said, "Where are you going?" To clarify that.

Q And that was all that was said at that point?

A Yes, to me.

Q When was it that you realized that you didn't recognize the driver?

A About when we got to the mall.

Q Did you have any conversation with him between the time you entered the vehicle and arriving at the mall?

A And who are we talking about?

Q Did you have a conversation with either of the two defendants?

A Not until we got to the mall.

Q You rode in silence until the mall?

A Yes. They were talking amongst themselves.

Q You never identified yourself by name?

A Oh, yes, I did.

Q So there was some conversation immediately after --

A Yes. They said, "Where are you going?" I said, "Magna. My name is Brandan."

Q Did you ever say to the driver, "Hey, I thought I knew you from high school. Where did you go to high school?" Anything like that?

A No.

Q Were you concerned at all when you realized you didn't know the driver?

A Not really.

Q Did you have a conversation with the driver about methamphetamine?

A He had a conversation about me -- or to me about it. He said, "I got a meth pipe. If you have any of that, you can load it up." I said, "I don't do that."

Q How did that come up, just out of the blue?

A He just said it, like they were off some binge or something. I don't know.

Q Did the driver appear to you to be under the influence of anything?

A I don't know. I couldn't tell.

Q How about the passenger?

A No.

Q Did you smell any alcohol in the vehicle?

A I smelled gasoline.

Q Were there any empty containers, any empty beer bottles or anything like that?

A I don't know.

Q You didn't see any in the area of the car you were in?

A I didn't see any.

Q You said the driver didn't, never said anything to you; is that correct?

A I guess he did.

Q What would that be?

A He asked me if I had any meth.

Q Anything else? Did he ask --

A And then he said -- yes, he did say -- after his brother got out and went into the mall, he said, "I am like his 'F'ing taxi."

Q What about, more specifically, about the gun? Did the driver have any conversation with you about the gun?

A No.

Q Did you tell the police that the driver told you that he had a .25 automatic?

A Yes, I did.

Q And how did you find out that information?

A I didn't know if it was a .25 automatic. I told him that I didn't know. Somebody said it. I don't know who did.

Q Somebody did, you are not sure whether it was the driver or the passenger?

A Yeah.

Q When you first got out of the car, Brandan, did both the driver and the passenger also exit the vehicle?

A Yes, they did.

Q And where were you standing when they were working -- who was working on the back seat of the vehicle?

A The driver. The driver was.

Q And where were you standing in relation to the vehicle?

A I was standing behind the driver's side door.

Q Where was the driver standing?

A He was standing -- he was in front of me, trying to fix the seat.

Q I am sorry, where was the passenger standing?

A I didn't notice, but he was standing over here.

Q When you say "over here," you are gesturing off to your right?

A OK, OK, OK, behind the car.

Q And in front of you?

A In back of me. Well, it was more like to the side of me.

Q Off to your right?

A Yes.

Q Can you describe the knife that the passenger pulled on you?

A Yeah. It had a black case on it, a black holder, and the blade was about 3 inches long, and it was fat at the bottom, small at the top, and it had like a saw at the bottom of the blade, but not on the top.

Q Serration?

A Yeah.

Q Will you describe the CD case that was taken from you.

A Yes. It was a black Case Logic CD case.

Q How many CD's does it hold?

A About 250.

Q Did you provide a list to the police detailing the inventory of the CD's that were taken?

A They have never asked me to.

Q Have any of these items been recovered?

A I don't think so.

Q You haven't gotten anything back?

A No.

Q And you also lost a player, a boom box, if you will, right?

A No. Personal.

Q A personal player?

A Yes.

Q What kind of CD player was that?

A That was a Panasonic.

MR. QUINLAN: That's all I have.

THE COURT: Any redirect?

MR. NEILL: Just a couple of questions.

* * *

REDIRECT EXAMINATION

BY MR. NEILL:

Q Brandan, a moment ago one of the defense attorneys asked you about a .25 automatic, that word was said. Could you please tell us who said it, and when someone referred to a specific gun?

A That's after we got out of the car, when he said, "Go get the gun," I thought he said .25 automatic. But I am not sure. I was pretty much in shock at that time.

Q So the passenger said, "Go get the .25 automatic"?

A Yes, the one that was holding the knife on me first.

Q And who asked you to remove your sweater?

A The passenger. He actually said, "Take off your clothes."

Q Then you took off your --

A Then I proceeded to take off my sweater.

Q Were you assuming he wanted to take it or something?

A I don't know. Just something to embarrass me is what I thought.

Q With regard to a question Ms. Gustin asked you about, who took what, if you could take a moment and, to the best of your recollection, who took your items, the driver, passenger?

MS. GUSTIN: Your Honor, I think that has been asked and answered.

MR. NEILL: I believe there were two answers. He said the driver took the portable CD player. And then when Ms. Gustin asked, I thought he said he -- I just was asking for some clarification.

THE COURT: In cross examination, Ms. Gustin, he did say he was not sure who took the CD's. On direct examination he indicated the driver took the CD's. There is some ambiguity. Therefore, I will allow the question.

Q As best as you can recall, and if you need a minute to think about it, who took what?

A The passenger took my CD player and my razor. And I heard the driver say, "I am keeping these," and took my CD's.

MR. NEILL: Thanks, Brandan.

Thank you, your Honor.

* * *

RECROSS EXAMINATION

BY MS. GUSTIN:

Q I have one follow-up. You said that you just took off your sweater or sweatshirt. What interrupted you taking off the rest of your clothes? Or did you just refuse to take

them off?

A No. I think -- I -- I don't remember. I don't know. Something happened, or they just got scared, or something like that, and decided to leave.

Q Had you been drinking that day?

A No, I hadn't.

Q Had you used drugs?

A No. I don't use drugs.

MS. GUSTIN: That's all I have.

THE COURT: Anything else, Mr. Quinlan?

MR. QUINLAN: It is not exactly related to the redirect. It is something briefly, if I could.

THE COURT: Go ahead. That's fine.

* * *

RECROSS EXAMINATION

BY MR. QUINLAN:

Q How did the conversation end when the driver asked you about whether you had any methamphetamine?

A I just said, "No. I don't do that."

Q Was that the end of the discussion?

A Yes, it was.

Q Was there any further talk about taking you to a party or anything like that?

A No, I don't remember.

Q Did you overhear any discussion between the driver

and the passenger about going to a party?

A I don't think so. The passenger was on the phone. That was about it. And he said, "I live in a storage shed," to his buddy on the phone.

Q Any other conversation that you can recall, that you haven't talked about, yet?

A I talked about when he went to J.C. Penney's, and the passenger said, "I am his taxi."

Q Anything else go on in the car, that we haven't discussed?

A No.

MR. QUINLAN: OK. Thank you.

THE COURT: Anything else?

MR. NEILL: No, your Honor.

THE COURT: Mr. Booth, thank you for your appearance today. You are welcome to stay in the courtroom as the victim in this case. You have that right.

Call your next witness.

MR. HILLS: Your Honor, Blake Hills for the State. The State will be calling Detective Johnson.

THE COURT: Mr. Johnson, come forward and be sworn.

* * *

FRANK JOHNSON,

called as a witness by the State, having been duly sworn, was examined and testified as follows:

Addendum C

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ROBERT KELTON BERRY

Defendant.

JURY INSTRUCTIONS

Case No. 031100783
Judge Stephen L. Roth

Members of the Jury: Attached are instructions numbered 1 through 26, given to you at the beginning of this trial, and instructions 27 through 42, which were presented to you at a later time in the proceedings. Taken together, these instructions govern your conduct and deliberations during the trial of this case and must be carefully considered and followed.

DATED this 10th day of December, 2003.

STEPHEN L. ROTH
District Judge

LIST OF JURY INSTRUCTIONS

JURY INSTRUCTIONS

1. GENERAL INSTRUCTION

There are certain laws and rules which apply to this case. I'll explain them to you from time to time during these proceedings in order to give you the information that you need to fulfill your role as jurors at each stage of the trial. I will give you the first set of instructions at this point. You will receive further instructions before evidence is presented and the final set of instructions after the close of evidence. Please pay careful attention. Each of you has been given a copy of these instructions. This copy is yours to keep. As I read these instructions to you, you may follow along on your copy, or not, as you wish. Keep in mind the following points:

Obey Instructions. Some of these instructions give you information about how the trial will proceed, the rules that govern this process, and the roles of the participants, including your role as jurors. Other instructions tell you what the law is that you are to apply in reaching your verdict in this case. If any attorney makes statements of the law that differ from the instructions on the law that I give to you, you should disregard such statements and rely entirely on these instructions.

Many Instructions. There will be many instructions. All are important. Don't pick out one and ignore the rest. Think about each instruction in the context of all the others.

Gender – Singular/Plural. In these instructions, any references to "she" or "her" also include "he" or "him," or *vice versa*, as appropriate to this case; and the singular, such as "defendant" includes the plural "defendants," when appropriate.

Note Taking. The Bailiff will provide you with notepads and pens, if you want them. You may take notes during the trial, but don't over do it, and don't let it distract you from following the evidence. The lawyers will review the evidence in their closing arguments and help you focus on what is most relevant to your decision. I also caution that notes are not evidence. Use them only to aid personal memory or concentration. Keep in mind that you must each arrive at a verdict independently, and one juror's memory of the evidence or opinion should not be given excessive consideration solely because that juror has taken notes.

Keep an Open Mind. Don't form or express an opinion about the ultimate issues in this case until you have listened to all the evidence and the lawyers' summaries, along with the final instructions on the law. Keep an open mind until then.

2. WHAT RULES APPLY TO RECESSES

From time to time I will call for a recess. It may be for a few minutes, a lunch break, overnight or longer. During recesses, do not talk about this case with anyone; not family, friends or even with each other. The bailiff may ask you to wear a badge identifying yourself as a juror so that people will not try to discuss the case with you. Don't mingle with the lawyers, the parties, the witnesses or anyone else connected with the case. You may say "hello" or exchange similar brief civilities with these persons, in passing, but don't engage in any conversation. Don't accept from or give to any of these persons any favors, however slight, such as rides or food. The lawyers and parties are naturally concerned to avoid any hint of improper contact with you, so don't think that they are being purposely rude if they avoid any interaction with you during the course of this trial. If anyone tries to talk to you about the case, let the bailiff know immediately. Finally, don't read about this case in the newspaper or listen to any reports on television or radio, if there are any. These restraints are necessary for a fair trial.

3. THE ROLE OF THE JUDGE, THE JURY AND THE LAWYERS

The judge, the jury and the lawyers are all officers of the Court and play important roles in the trial.

Judge. It is my role as judge to decide all legal issues, supervise the trial and instruct the jury on the LAW that it must apply.

Jury. It is your role as the jury to follow that law and decide the factual issues. Factual issues generally relate to WHO, WHAT, WHEN, WHERE, HOW or similar things concerning which evidence will be presented.[1]

Lawyers. It is the role of the lawyers to present evidence, generally by calling and questioning witnesses and presenting exhibits. It is the responsibility of each of the lawyers to be an advocate, and each has a duty to try to persuade you to accept her version of the facts and to decide the case in favor of her client.

---

[1] In the case of alternate juror(s): An alternate juror has the same responsibilities as any other juror, as he may be required to take the place of one of the jurors in the panel in the event an original juror is unable to complete her service. Any alternate juror selected will be identified as such once the case has been presented and the jury is ready to retire to deliberate on a verdict.

Keep in mind that neither the lawyers nor I actually decide the case, because that is your role. Don't be influenced by what you think our personal opinions are; rather, you decide the case based upon the law explained in these instructions and the evidence presented in court.

4. OUTLINE OF THE TRIAL

The trial will generally proceed as follows:

Opening Statements. The lawyers will outline what the case is about and indicate what they think the evidence will show.

Presentation of Evidence. The plaintiff will offer its evidence first followed by the defendant. Each side may also offer rebuttal evidence after hearing the witnesses and seeing the exhibits offered by the other side.

Additional instructions on the Law. After each side has presented its evidence, I will give you additional instructions on the law that applies to this case.

Closing Arguments. The lawyers will then summarize and argue the case. They will share with you their respective views of the evidence, how it relates to the law and how they think you should decide the case.

Jury Deliberation. The final step is for you to retire to the jury room and deliberate until you reach a verdict, and you will be given additional instructions about how you are to do that later.

5. THE CHARGE(S) and THE PRESUMPTION OF INNOCENCE

The defendant in this case has been accused of committing a crime. The accusation is in a written document called an INFORMATION, which will be read or summarized for you following this instruction. As you listen, keep in mind that the defendant has answered the charge by saying "not guilty." The defendant is presumed to be innocent of the charge.

[THE INFORMATION IS READ OR SUMMARIZED FOR THE JURY]

AGGRAVATED ROBBERY, at 3695 West 2340 South, in Salt Lake County, State of Utah, on or about March 12, 2003, in violation of Title 76, Chapter 6, Section 302, Utah Code Annotated 1953, as amended, in that the Defendant Robert Kelton Berry, as a party to the offense, intentionally or knowingly used force or fear of immediate force against Phillip B Booth in the course of committing a theft, used or threatened the use of a dangerous weapon, to-wit: Firearm and/or a knife. Further that a dangerous weapon or a facsimile of a dangerous weapon or the representation of a dangerous weapon was used in the commission or furtherance of the Aggravated Robbery.

6. WHAT IS THE JURY'S ROLE IN THIS CASE?

You must decide whether each charge against the defendant has been proven beyond a reasonable doubt. Your decision is called a VERDICT. Your verdict must be based only on the evidence produced here in court. It must be based on facts, not on speculation. Don't guess about any fact. However, you may draw reasonable inferences or arrive at reasonable conclusions from the evidence presented.

7. WHAT IS EVIDENCE?

Evidence is anything that tends to prove or disprove the existence of a disputed fact. It can be testimony, or documents, or objects, or photographs, or stipulations, or certain qualified opinions, or any combination of these things. Sometimes the lawyers may agree that certain facts exist; this is called a stipulation. You should accept any stipulated facts as having been proved. In limited instances, I may take "judicial notice" of a well-known fact. If that happens, I will explain how you should treat it.

8. OPINION TESTIMONY

Under certain circumstances, witnesses are allowed to express an opinion. A person who by education, study or experience has become an expert in any art, science or profession, may give her opinion and the reason for it. A layperson (a non-expert) is also allowed to express an opinion if it is based on personal observations and it is helpful to understanding his testimony or the case. You are not bound to believe anyone's opinion. Consider it as you would any other evidence, and give it the weight you think it deserves.

9. WHAT IS NOT TO BE CONSIDERED OR USED AS EVIDENCE?

I've explained to you what evidence is. Now I'll tell you about some things which do not qualify as evidence or which, for some other good reason, you should not consider in reaching your verdict.

Accusation. The fact that formal charges have been filed accusing the defendant of committing a crime is not evidence of guilt. The defendant has entered a plea of not guilty and is presumed to be innocent. As I will discuss in more detail later in these instructions, it is the prosecution's burden to prove to you that the defendant is guilty beyond a reasonable doubt; the defendant does not have the burden to prove that he or she is innocent.

Punishment. You may be aware of the gravity of the offense charged and the range of potential penalties, but you should not consider what actual punishment the defendant may receive if found guilty. That is for the judge to decide based upon the applicable law.

Right to Remain Silent. If the defendant chooses not to testify in this case, you cannot consider that as evidence of guilt. The Constitution provides that an accused person has the right not to testify and you should not draw any negative inferences based upon a defendant's reliance on this right. If the defendant does choose to testify, his or her testimony should be given the same consideration you would give to the testimony of any other witness. The fact that a person is accused of a crime is no evidence of that person's guilt and is no reason for rejecting his or her testimony; it should be weighed the same way you weigh the testimony of any other witness.

Lawyer Statements. What the lawyers say is not evidence. Their purpose is to give you a preview of expected evidence and to help you understand the evidence from their viewpoint. If a lawyer makes a statement about the evidence which is different from your own recollection of the evidence, you should rely on your own memory.

Personal Investigation. Evidence is not what you can find out on your own. You should not make any investigation about the facts in this case. Do not make personal inspections, observations or experiments. Do not view premises, things or articles not produced in court. Don't let anyone else do anything like this for you. Don't look for information in law books, dictionaries or public or private records which are not produced in court.

Out of Court Information. Do not consider anything you may have heard or read about this case in the media or by word of mouth or other out-of-court communication. You must rely solely on the evidence that is produced and received in court.

10. THE JUDGE DECIDES WHAT EVIDENCE IS ADMISSIBLE

Sometimes a question will be raised about whether certain evidence is proper for the jury to consider. This type of question is called an OBJECTION. I rule on objections. If an objection is SUSTAINED the evidence is kept out and you should not consider it, nor should you guess as to what the evidence might have been or as to the reason for the objection. If an objection is OVERRULED the evidence comes in and you may consider it. If evidence which you have heard or seen is STRICKEN you must ignore it.

My decisions regarding the admission of evidence involve issues of law, and I am not giving any opinion as to which witnesses are or are not worthy of belief or as to which party should prevail in the case. Don't be concerned about the reasons for my rulings, and don't try to infer anything about the case from those rulings.

Further, if I do or say anything during the course of this trial that suggests to you that I favor the position of either party, whether in my rulings or otherwise, it is entirely unintentional; and you must not be influenced by that in any way.

[OPENING STATEMENTS BY COUNSEL]

11. HOW TO MAKE DECISIONS ABOUT THE EVIDENCE

It will be your duty to determine your verdict relying solely on the evidence presented during the trial. For that purpose you should consider all of the evidence together, fairly, impartially and conscientiously, putting aside any bias, prejudice, or preconceptions.

Once evidence is admitted, you must decide three things about it: Whether it should be believed, how important it is, and what you can infer or conclude from it.

Use your common sense as a reasonable person in making these decisions. Review all the evidence. Don't imagine things which have no evidence to back them up. Consider the evidence fairly without any bias or sympathy toward either side.

Where there is conflicting evidence, you should try to reconcile the conflict so far as you reasonably can. Where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are.

12. DECIDING WHETHER TO BELIEVE A WITNESS

You are the sole judges of the importance of the evidence, the believability of the witnesses and the facts. There is no firm rule that I can give you for determining whether a witness is truthful. As each witness testifies, you must decide how accurate that testimony is and what weight to give it, using your own good judgment and experience in life. In evaluating testimony, it may help you to ask yourself questions such as these:

Personal Interest. Does the witness have a personal interest in how the trial comes out?

Other Bias. Does the witness have some other bias or motive to testify a certain way?

Demeanor. What impression is made by the witness's appearance and conduct while answering questions?

Consistency. Did the witness make conflicting statements or contradict other evidence?

Knowledge and Memory. Did the witness have a good opportunity to know the facts and the ability to remember them?

Reasonableness. Is the testimony reasonable in light of human experience?

You may also apply any other common sense yardstick to the testimony you hear and the other evidence you receive. You are not required to believe any witness or all that a witness says. You are entitled to believe one witness as against many or many as against one, in accordance with your honest convictions. The mere fact that a witness is a police officer, in itself, does not make that person's testimony more or less credible, but such testimony must be weighed in the same way as you would any other witness.

13. WHAT IF A WITNESS PURPOSELY GIVES FALSE TESTIMONY?

If you believe a witness has purposely given false testimony about anything relevant to the case, you may disregard not only the false testimony but any of the remaining testimony from that witness, or you may give the remaining testimony whatever weight you think it deserves.

14. WHO IS RESPONSIBLE TO CONVINCE THE JURY?

The prosecution has the burden of proof. It is the one making the accusations in this case. The defendant is not required to prove innocence - you must start by assuming it. According to our law, the defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt. This is an important and humane provision of the law intended to guard against the danger of an innocent person being unjustly punished.

15. HOW CONVINCED MUST THE JURY BE BEFORE DECIDING THE DEFENDANT IS GUILTY?

Before you can give up your assumption that the defendant is innocent, you must be convinced that the defendant's guilt has been proven beyond a reasonable doubt. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind and convinces the understanding of reasonable persons who are bound to act conscientiously upon it.

16. WHAT IS A REASONABLE DOUBT?

A reasonable doubt is one based upon reason and common sense rather than speculation, supposition, emotion or sympathy. It is the kind of doubt that would make a reasonable person hesitate to act. It must be real and not merely imaginary. It is such as would be retained by reasonable men and women after a full and impartial consideration of all the evidence, and must arise from the evidence or lack of evidence in the case.

17. HOW TO EVALUATE DOUBT

If after such full and impartial consideration some possible doubt exists, you must determine whether such doubt is reasonable in light of all the evidence. Ask yourselves if the doubt is consistent with reason and common sense. The law does not require that the evidence dispel all possible or conceivable doubt, but rather the law requires that the evidence dispel all reasonable doubt. That is what is meant by the phrase "proof beyond a reasonable doubt."

[THE EVIDENCE IS PRESENTED AT THIS POINT]

[AFTER THE CLOSE OF EVIDENCE, THE CLERK ADDS TO EACH COPY ADDITIONAL INSTRUCTIONS APPLICABLE TO THIS CASE]

18. INSTRUCTIONS ON THE LAW THAT APPLIES TO THIS CASE

The clerk has attached to your copy of these instructions some additional pages which contain instructions relating to the particular laws or rules that apply to this case. These additional instructions begin with instruction number twenty-seven (27). We will read those after completing our review of the following instructions which relate essentially to the procedure that you should follow when you are released to deliberate.

19. WHAT TO TAKE WITH YOU INTO THE JURY ROOM

You may take the following things with you when you go into the jury room to discuss this case:

a. All exhibits admitted in evidence;

b. Your notes (if any);

c. Your copy of these instructions; and

d. The verdict form or forms that will be given to you.

20. WHAT TO DO IN THE JURY ROOM

The first thing you should do in the jury room is choose a person to be in charge. This person is called the FOREPERSON. The Foreperson's duties are:

a. To keep order and allow everyone a chance to speak;

b. To represent the jury in any communications you make; and

c. To sign your verdict and bring it back to court.

In deciding what the verdict should be, all jurors are equal. The Foreperson has no more power than any other juror.

21. CONSIDER EACH OTHER'S OPINION, THEN REACH YOUR OWN DECISION BASED UPON HONEST DELIBERATION

It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of opinion or to announce a determination to stand for a certain verdict. When that is done at the outset, a person's sense of pride may block appropriate consideration of the case. Use your common memory, your common understanding and your common sense. Talk about the case with each other as you ponder and deliberate.

In the end, your verdict must be your own. Don't make a decision just to agree with everyone else. You should, however, respect and consider the opinions of the other jurors. If you are persuaded that a decision you initially made was wrong, don't hesitate to change your mind. Help each other arrive at the truth. Your decision must be unanimous. In an

attempt to reach a decision, you may not resort to chance or any form of decision-making other than honest deliberation.

22. WHAT TO DO IF YOU HAVE QUESTIONS DURING DELIBERATION

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence that has been presented to you.

23. FOCUS ON THIS CASE ALONE

Your duty is to decide this case and this case alone. You should not use this case as a forum for correcting perceived wrongs in other cases or in the broader society, or as a means of expressing views about anything other than the guilt or innocence of this defendant. Your verdict should reflect the law given to you in these instructions applied to the facts that you find to be supported by the evidence. Your decision should not be distorted by any outside factors or objectives.

The final test of the quality of your service will be the verdict you return. You will make an important contribution to justice and your community if you focus exclusively on this case and return a just and proper verdict.

24. REACHING A VERDICT

This being a criminal case, your verdict must be unanimous; all jurors must agree. When you are all in agreement, then you have reached a verdict and your work is finished.

25. HOW TO REPORT YOUR VERDICT

When you have reached a verdict, the Foreperson should date and sign the verdict form which corresponds to your decision. Then notify the bailiff that you are ready to return to court.

26. WHAT HAPPENS AFTER THE VERDICT HAS BEEN REPORTED

After you have given your verdict to the judge, he or the clerk may ask each of you about it to make sure you agree with it. Then you will be released from your jury service and you may leave at any time. If you want to, you may remain in the courtroom to watch the rest of the proceedings, which should be quite brief.

After you are excused, you may talk about the case with anyone. Likewise, you are not required to talk about it, if you don't want to. If anyone attempts to talk to you about the case when you don't want to do that, please tell the Court Clerk. Finally, if you do decide to discuss the case with anyone, keep in mind that your fellow jurors freely stated their opinions in the jury room with the understanding that they were speaking in confidence. Please respect the privacy of the views of your fellow jurors.

[FINAL ADDITIONAL INSTRUCTIONS ADDED AFTER THIS PAGE]

INSTRUCTION NO. 27

The intent with which an act is done shows a state of mind and reveals a purpose in so acting. Intent, being a state of mind, is seldom shown by proof of direct and positive evidence and is ordinarily inferred from acts, conduct, statements and circumstances.

INSTRUCTION NO. 28

Intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which an act is done or omitted.

Motive is not an element of any offense, and hence need not be proven. The motive of an accused is immaterial except insofar as evidence of motive may aid in your determination of state of mind or intent.

INSTRUCTION NO. 29

To constitute the crime charged in the information there must be the joint operation of two essential elements: conduct prohibited by law and the appropriate culpable mental state or states with regard to the conduct prohibited by law.

Before a defendant may be found guilty of a crime, the evidence must prove beyond a reasonable doubt that the defendant was prohibited by law from committing the conduct charged in the information and that the defendant committed such conduct with the culpable mental state required for such offense.

"Conduct" means an act or omission.

"Act" means a voluntary bodily movement and/or speech.

"Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

INSTRUCTION NO. 30

A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

INSTRUCTION NO. 31

Although there is more than one person who is named in this action, the case against each person is separate from and independent of the case of the other. In this action the only defendant on trial is Robert K. Berry. You are not to concern yourselves with the status of the case against the other defendant named in this trial.

INSTRUCTION NO. 32

Every person, acting with the mental state required for the commission of the offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

INSTRUCTION NO. 33

"Dangerous weapon" means any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:

(a) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(b) the actor represents to the victim verbally or in any other manner that the actor is in control of such an item.

INSTRUCTION NO. 34

You are instructed that a firearm is a dangerous weapon.

INSTRUCTION NO. 35

You are instructed that a knife is a dangerous weapon.

INSTRUCTION NO. 36

"Unlawful" means that which is contrary to law or unauthorized by law, or, without legal justification, or, illegal.

"Personal property" mean anything of value, and includes money.

INSTRUCTION NO. 37

Before you can convict the defendant, Robert K. Berry, of the offense of Aggravated Robbery as charged in the Information, you must first find that the defendant committed Robbery. Before you can find that the defendant committed Robbery, you must find from all of the evidence and beyond a reasonable doubt each one of the following elements of that offense:

1. That on or about the 12th day of march, 2003, in Salt Lake County, State of Utah, the defendant, Robert K. Berry, himself or as a party to such conduct, took personal property in the possession of Brandon Booth from the person or immediate presence of Brandon Booth; and

2. That such taking was unlawful; and

3. That such taking was intentional; and

4. That such taking was against the will of Brandon Booth; and

5. That such taking was accomplished by means of force or fear.

If you find each and every one of the preceding elements, you must then consider whether the defendant committed Aggravated Robbery. Before you can find that defendant committed Aggravated Robbery, you must find from all of the evidence and beyond a reasonable doubt:

6. That, in the course of committing robbery, the defendant, himself or as a party to such conduct, used or threatened to use a dangerous weapon.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Robbery, as charged in the Information. If you are not convinced of the truth of any one or more of the foregoing elements beyond a reasonable doubt, then you must find the defendant not guilty of Aggravated Robbery, as charged in the Information.

INSTRUCTION NO. 35

The law permits a jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged in the Information whenever such a course is consistent with the facts found by the jury from the evidence in the case and with the law as stated by the court.

INSTRUCTION NO. 39

If you do not find the defendant, Robert K. Berry, guilty of the offense of Aggravated Robbery, as charged in the information, you should consider whether the defendant is guilty of Robbery, a lesser included offense of Aggravated Robbery.

Before you can convict the defendant, Robert K. Berry, of the offense of Robbery as charged in the Information, you must find from all of the evidence and beyond a reasonable doubt each one of the following elements of that offense:

1. That on or about the 12th day of march, 2003, in Salt Lake County, State of Utah, the defendant, Robert K. Berry, himself or as a party to such conduct, took personal property in the possession of Brandon Booth from the person or immediate presence of Brandon Booth; and

2. That such taking was unlawful; and

3. That such taking was intentional; and

4. That such taking was against the will of Brandon Booth; and

5. That such taking was done by means of force or fear.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Robbery. If you are not convinced of the truth of any one or more of the foregoing elements beyond a reasonable doubt, then you must find the defendant not guilty of Robbery.

INSTRUCTION NO. 40

An act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of such a taking.

INSTRUCTION NO. 41

If you find the defendant guilty of Aggravated Robbery, you must decide from all the evidence whether the following occurred:

> A dangerous weapon was used by the defendant, himself or as a party to such conduct, in the commission or furtherance of the Aggravated Robbery.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of the foregoing statement beyond a reasonable doubt, then you must find that a dangerous weapon was used as stated above. If you are not convinced of the truth of the foregoing statement beyond a reasonable doubt, then you must find that a dangerous weapon was not used as stated above.

INSTRUCTION NO. 42

Your verdict in this case must be either:

GUILTY of Aggravated Robbery, as charged in the Information,

or

NOT GUILTY of Aggravated Robbery, as charged in the information;

and

GUILTY of Robbery, a lesser included offense of Aggravated Robbery,

or

NOT GUILTY of Robbery, a lesser included offense of Aggravated Robbery.

YOU MAY NOT FIND THE DEFENDANT GUILTY OF BOTH AGGRAVATED ROBBERY AND ROBBERY.

IF YOU FIND THE DEFENDANT GUILTY OF AGGRAVATED ROBBERY, then you must decide the following:

A dangerous weapon WAS USED by the defendant, himself or as a party to such conduct, in the commission or furtherance of the Aggravated Robbery

or

A dangerous weapon WAS NOT USED by the defendant, himself or as a party to such conduct, in the commission or furtherance of the Aggravated Robbery

As I have instructed you before, because this is a criminal case, your verdict must be unanimous.

DATED this 10th day of December, 2003.

BY THE COURT:

Stephen L. Roth
DISTRICT JUDGE

Addendum D

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROBERT KELTON BERRY, Defendant.	Case No. 031100783 Transcript of: JURY TRIAL VOLUME I

BEFORE THE HONORABLE STEPHEN L. ROTH

3636 Constitution Blvd.
West Valley City, Utah 84119

DECEMBER 9, 2003

REPORTED BY: BRAD YOUNG
238-7531

Q Again, if I am you, where did he hold this knife to your neck?

A Like right here.

Q Thank you. You may be seated.

Brandan, when the defendant's younger brother hit you, did he say anything at that point?

A Not when he hit me; but after he hit me, he said, "What do you have? Give me all your stuff."

Q Was that before he pulled out the knife, or after?

A That was after.

Q What did the knife look like?

A Black handle, silver blade, a couple inches belong.

MR. NEILL: Your Honor, may I approach the witness?

THE COURT: You may.

Q (By Mr. Neill) Brandan, I am showing you a knife, not the knife used in this case, but is this a knife similar to what the defendant's brother had?

A Yes, it is.

Q It was a flip blade?

A Uh-huh (affirmative).

Q Are there any differences between the knife you are holding now and the knife that was pulled on you?

A I am not sure. It looks about the same.

Q You mentioned that he held that to your throat?

A Yeah.

Q What were you thinking at this point?

A My life is over. I don't know.

Q Did you feel threatened?

A Yeah, I did.

Q What did you do?

A Gave him all my stuff.

Q What stuff was that?

A CD's, my radio, my wallet, everything I had.

Q You gave those items to the defendant's younger brother?

A No, not all of them. I gave my CD's and my wallet to him.

Q Your CD's?

A No, my CD player and my wallet. And then I don't remember where my CD's were. I think they were in the car.

Q What did the defendant's brother do with your wallet?

A Looked through it, took the money out, threw it back at me at some point.

Q While the defendant's brother had the knife to your throat, while he took this stuff, do you recall what the defendant was doing?

A I think he was reaching under his seat. I am not sure. It was a long time ago, and I don't remember every little thing.

Q Did the defendant ever take possession of any of your

items?

A He took my CD's.

Q Please tell the jury about that.

A I don't remember where they were or anything, but the -- his brother wanted to give them back to me, and then he looked through them.

Q Who is "he"?

A The defendant looked through them. And he said, "I am keeping these."

Q And did he keep them?

A Yeah.

Q How many CD's did you have in there?

A About 200.

Q And did you buy all those CD's, yourself?

A Yeah, I did.

Q What did the defendant do with the CD's, the CD case?

A I don't know.

Q Brandan, at that point what happened?

A They tried to make me take my clothes off. And then they made me get in the corner. They didn't --

MS. GUSTIN-FURGIS: Your Honor, I am going to object. He is saying "they." I would like to know specifically who did what.

THE COURT: Sustained. You are going to need to lay a little more foundation as to who said what.

Addendum E

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROBERT KELTON BERRY, Defendant.	Case No. 031100783 Transcript of: JURY TRIAL VOLUME II

BEFORE THE HONORABLE STEPHEN L. ROTH

3636 Constitution Blvd.
West Valley City, Utah 84119

DECEMBER 10, 2003

REPORTED BY: BRAD YOUNG
238-7531

what's going on. He wouldn't have wasted his time to fix the seat. There would be no reason to do it.

Now, the State is trying to suggest that the -- the victim is trying to suggest that the victim was taken on a wild goose chase here. And that just is not true. Again, he was in the car for a long period of time. And if you are going up to Bangerter to go out to Magna, you can cut through there. They went to the McDonald's which is on 36th West. You go north there. You run into the residential areas. And there are several streets that head up to Bangerter. The only reason they pulled over in that area was, number one, first, Karl had to throw up, if you remember that. He got sick and he got out. He threw up. Then they get back in. Then they have to adjust the seat, because the guy was uncomfortable. He mentions that. He says that his feet were scrunched up and it was very uncomfortable. And that is why they pulled over, not to pull over into some secluded area to rob him.

Now, ladies and gentlemen, I told you in opening that I would talk about beyond a reasonable doubt. And that's a very, very high standard in our justice system. It is the highest standard of proof that there is. And there are several standards of proof. One is by the preponderance of the evidence. And that's in a civil case. And the jury can find for, say, like a plaintiff, if they have shown by the preponderance of the evidence whatever they are trying to

prove.

A higher standard is clear and convincing evidence. That's even a higher standard.

And, ladies and gentlemen, if you find that the State has proven this case by a preponderance of the evidence, or if you find that the State has proven its case by clear and convincing evidence, your verdict must be not guilty, because that is not high enough. Beyond a reasonable doubt is higher than that. If you think that he maybe committed an aggravated robbery or a robbery, your verdict must be not guilty. If you think that he probably committed a robbery or an aggravated robbery, your verdict must still be not guilty. That is how high the standard of proof is in this case.

And I have talked about how serious these offenses are, and how important this decision is that you are making today. It is as important, if not more important, than deciding who you are going to marry or if you are going to buy a house. That's how careful you have to be and what factors you would weigh in saying, "Am I going to marry this person?" And the thing is, in a case like that, with buying a house or marrying somebody, you can change that decision. You can get a divorce. You can sell your house. But in this case you cannot.

And, ladies and gentlemen, I was going over the transcript last night, and I just gave up counting how many

times the victim said, "I don't know. I'm not sure. I don't know. I'm not sure." That is not beyond a reasonable doubt. He is not sure what happened, so how can you be sure? How can they ask you to convict him? They have not proven their case beyond a reasonable doubt, and I ask for two not guilty verdicts.

Thank you.

THE COURT: Thank you, Ms. Gustin-Furgis.

Ms. Peters?

MS. PETERS: Thank you, your Honor. The defendant did the best he could. So then he drove Brandan to safety. He was the driver. His brother wanted to jack him. He got a text message and then he said, "Don't do it." So, of course, the next step would be to drive Brandan to safety, because he didn't want it to happen, so he drove Brandan to a bus stop. No, we didn't hear anything about that. He drove Brandan to a police station, so he wouldn't get jacked. We didn't hear anything about that, either. Did he drive Brandan home? No. Instead, he drove Brandan to a secluded area. When you go back and deliberate, look at the map. See how many houses you see on the map. See how many warehouses you see. There is nothing back there but warehouses. And you heard testimony from John Maez, who has been a security guard with USANA for six years, that there is nothing over there except warehouses. I don't think that that is a protective area. I don't think the

Addendum F

Utah Rule of Criminal Procedure 17(g) outlines the different stages of a criminal jury trial:

> (g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:
>
> (1) The charge shall be read and the plea of the defendant stated;
>
> (2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;
>
> (3) The prosecution shall offer evidence in support of the charge;
>
> (4) When the prosecution has rested, the defense may present its case;
>
> (5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;
>
> (6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and.
>
> (7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

Addendum G

Utah Rule of Criminal Procedure 19 details the procedures for instructing jurors:

> Rule 19. Instructions.
>
> (a) After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.
>
> (b) During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.
>
> (c) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.
>
> (d) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall

distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(e) Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In stating the objection the party shall identify the matter to which the objection is made and the ground of the objection.

(f) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(g) Arguments of the respective parties shall be made after the court has given the jury its final instructions. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

Addendum H

The Fifth Amendment to the United States Constitution guarantees criminal defendants due process of law:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Addendum I

Article I, section 7 of the Utah Constitution provides all persons the right to due process of law: "No person shall be deprived of life, liberty or property, without due process of law."